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THE
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IMPORTANT BANKRUPTCY DECISIONS

IN THE UNITED STATES.

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THE NATIONAL
BANKRUPTCY REGISTER
REPORTS.

VOLUME XII.

UNITED STATES DISTRICT COURT—DELAWARE.

- A partner is bound by the act of his co-partner within the scope of the business of the firm, even if that act be fraudulent as between the partners.
- B., a member of the firm of E. H. & Co., obtained from S., the bankrupt, two notes made by S. to the order of E. H. & Co. and for their accommodation, and it was understood that the notes should be paid at maturity by E. H. & Co. The notes were obtained by B. without the knowledge of H., his partner, and were indorsed with the firm name, and discounted at bank, and the proceeds used by B. for his own purposes in fraud of H. H. paid the notes at maturity, and proved them as a claim against the bankrupt estate due to him as an individual.
- Held*, that H. was bound by the knowledge of his partner that no consideration passed to S. for the notes, and by B.'s agreement that the firm would pay notes at maturity, and that the proof must be expunged.

GEORGE S. CAPELLE, Assignee of JACOB SINEX,
v. EDWIN HALL.

PETITION to expunge proof of claim by the respondent.

Geo. H. Bates, for the petitioner.

Thos. J. Clayton, for the respondent.

BRADFORD, J.—I am asked to strike off two promissory notes held by Edwin Hall, of the city of Philadelphia, from the list of claims proven, for reasons stated in the petition of George S. Capelle, Assignee in Bankruptcy of Jacob Sinex. The first note is dated May 21, 1870, at Chester, Pa., and is for the payment, at four months, of the sum of fourteen

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hundred and eighty-six dollars, to the order of Edwin Hall and Company, and by them indorsed and signed "Jacob Sinex." The second note is dated June 22, 1870, at Chester, Pa., and is for the payment of thirteen hundred and eighty-six dollars, at four months, to the order of E. Hall & Co., and by them indorsed and signed "Jacob Sinex." Edwin Hall claims as indorsee of E. Hall & Co.

It is admitted that one E. M. Broomall was at the same time a member of the firm of E. M. Broomall & Co., and also of the firm of E. Hall & Co., and was so at the time of the making of both the above-mentioned notes. It is admitted that E. M. Broomall, as a member of the firm of E. Hall & Co., obtained both the notes in question from Sinex, without the knowledge of Edwin Hall, the other member of that firm. It is also admitted that Sinex gave the notes in question into the hands of E. M. Broomall, with the understanding that he, Sinex, was in no case to be called on for payment of the same, but would be protected from any such liability by the payees of the note, Sinex simply loaning his credit to enable E. Hall & Co. to borrow money on the note. In short, the one gave and the others accepted the notes as accommodation notes. It will be observed, then, that these notes were both made to E. Hall & Co., as the payees thereof, to the same firm, though on one note it is called E. Hall & Co., and on the other "Edwin Hall & Co."

Let us consider the case of the note for fourteen hundred and eighty-six dollars first. The payment of this note is objected to by the assignee on two grounds: *first*, Edwin Hall being a partner in the firm of "Edwin Hall & Co.," at the time this note was given, must be presumed to have had notice that the note in question was received without any consideration whatever passing from the partnership to him, and as the firm could not sue, so Edwin Hall, as an individual member of the firm affected by this presumed knowledge of the want of consideration, and bound by the act of his partner, though unknown to him at the time, could not sue Sinex; and, *secondly*, if Edwin Hall ever was the legal owner

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of this note, he became so by purchasing it after it was dishonored, and took it subject to all equities as between the original parties, viz.: Sinex and "Edwin Hall & Co."

As the result of the admissions of counsel and the evidence in this case, I think it is established that this note was presented for discount by E. M. Broomall, on behalf of E. Hall & Co., to a bank in Philadelphia, that it was there discounted, and the funds passed to the credit of Edwin Hall & Co., and were drawn out by E. M. Broomall, as the funds of "Edwin Hall & Co." That on the day this note became due, without the same having gone to protest, but to save the same from protest and protect himself from suit as a member of the firm of Edwin Hall & Co., Edwin Hall did then and there pay the said note, and thus became the owner and possessor of the same, by transfer and delivery of the party who had discounted it. Edwin Hall paid this note with his own individual funds. Did the fact that Edwin Hall was a member of the firm of "Edwin Hall & Co.," at the time of the making and delivery of the note in question to E. M. Broomall, incapacitate him from suing Sinex on said note, in case it should be transferred legally to him as an individual for a valuable consideration. If the affirmative of this proposition is true, it settles the question of liability on these notes.

This note was an accommodation note given by Sinex to the firm of Edwin Hall & Co. It was to enable that firm to raise money on the strength of Sinex' name. It is a mistake to suppose it was an accommodation note to E. M. Broomall. Broomall represented the firm of Edwin Hall & Co. in requesting this accommodation, and the — firm were the payees of the note. The funds to be raised could pass to none but the payees or their order. They were passed to the credit of the firm in point of fact, and the subsequent fraud of Broomall in using the funds for his own private benefit, does not in the least affect the relation in which the payees stood to the accommodation maker. This firm then and there agreed not to call upon Sinex for payment of that

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note, on the ground distinctly understood between them, that there was no consideration for it.

I say this *firm* then and there agreed, for I consider Mr. Edwin Hall, the claimant, was bound by the act of his partner, E. M. Broomall, in that transaction, and none the less because it was unknown personally to him at the time.

The trust reposed by one partner in another is of the most extensive and serious character; so wide is the range that every honest partner is absolutely in the power of any dishonest one with whom he may have rashly associated himself. But while he may suffer from the wrongful acts of his dishonest partner, he owes it to the business community both in morals and in law that no one doing legitimate business with the concern, still more no one befriending the concern by a loan of credit, should suffer because of the acts and representations of one whom the innocent and honest partner had selected as his agent, and to whose acts and representations he had requested full faith and credit to be given. I take it for granted, in the transaction of the affairs of a general business firm, the taking of accommodation paper and the consequent necessary agreement, growing out of that fact, not to call upon the maker for payment, is fully within the scope of the purposes of such a partnership and of the means proper to effect such purposes, and an act to the consequences of which, therefore, one partner can and does bind the other. The general principle governing such cases is well stated by Chancellor Kent, 3 Com., 41, in these words; viz.; "The act of one partner, though on his private account and contrary to the private arrangement among themselves, will bind all the parties if made without knowledge in the other of the arrangement, and in a matter which, in the usual course of dealing, has reference to business transacted by the firm;" and again on the same page:—"In all contracts concerning negotiable paper the act of one partner binds all, and even though he signs his individual name, provided it appears on the face of the paper to be on partnership account, and to be intended to have a joint operation."

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Does the contract or agreement made by a member of a firm in the name of the firm who are the payees of an accommodation note, and who raise money on the same, not to call upon the maker for payment, bind the other member who was personally ignorant of the transaction? How far is the *ignorant partner* liable for the acts and declarations of the other?

In 7 East, 210—*Swan et al. v. Steele, Clerk & Wood*—the court decide the liability of one partner for the act of another on the following facts:—A, B, and C traded under the name of A and B in the cotton business (C being a secret partner); A and B traded alone under the same firm name in the business of grocers, and to pay a debt they owed in the grocery business indorsed over a bill belonging to the firm in which C was then partner in the cotton business—and this without the knowledge of C; *held*, C was liable to be sued on this indorsement, the plaintiff not knowing at the time of the misapplication of the partnership funds.

This case illustrates the liability of one partner for the acts of the other, even when the act is a fraud on the innocent partner. In *Jacaud & Gordon v. French et al.*, 12 East, 317, where money had been received by one member of a firm unknown to the other member, for the purpose of paying certain bills, and the former, instead of paying, as was requested, diverted the funds to another purpose, and afterwards when these bills came into the hands of another firm for value, of which the partner ignorant of the reception of the money for the purpose aforesaid was also a member, and the cotton firm brought suit on these bills, the court held that the plaintiffs could not recover, and used these words: “Jacaud, being a partner with Blair, must be considered as having together with Blair (the fraudulent partner of the first firm) received money from the drawees to take up this very bill, how then can he, because he is also a partner with Gordon (the other individual member of the second firm suing on the bills) in another house, be permitted to contravene his own act, and sue upon this bill which has been already satisfied as to him.” This case establishes the principle

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that an act of one partner which amounts to a defense against an action thereafter brought, if it had been performed by all the members of the firm, will, although in fraud of the other innocent and ignorant partner, be a defense not only in an action brought by him individually, but by any other firm of which he was at the time a member. Not only is he prevented from suing separately by reason of being bound by the act of his dishonest partner, but this incapacity disables another firm receiving the said bill for value, of which he was also at that time a member, from suing, inasmuch as he is a necessary party to their suit. In that case one partner (the dishonest one) performed an act which amounted to a valid defense, although unknown to the innocent partner, and that act bound the ignorant and innocent partner. In this case one partner makes a contract to take up accommodation paper lent to the firm of which he is a member, certainly a valid defense in a suit by payees against the maker. And how can the principle be different where the suit is sought to be sustained by one of the individual payees composing the firm making this contract, instead of both? *Richmond v. Heapy et al.*, 1 Starkie, 202, was an action brought to test the validity of a commission in bankruptcy, and the question was, whether the commission was supported by a good petitioning creditor's debt, and the facts are these, viz.: One of three partners undertook to provide for two bills of exchange drawn by *the three* partners, and accepted by a fourth person, when they should become due. It was held that the three partners could not prove their claim on the acceptance in bankruptcy, that they were bound by the conduct of the one partner taking the acceptance as an accommodation one, although they were ignorant of the fact, and it was in fraud of their rights.

Now this case would be the same exactly as ours, if the claim in this instance was sought to be proved by "E. Hall & Co." It does establish, however, that this agreement not to sue Sinex, arising out of the acceptance of this paper as accommodation paper for the firm, was the act of the firm,

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and consequently the act of the individual members of the firm. For in this case the bills were drawn in the names of the three members, as in ours the note was given to and received by all the members of the firm ; viz. : E. M. Broomall and Edwin Hall. Now, if the firm (in the case last cited) could not sue because by the act of one of its members it had created a defense, why, in our case, when a complete defense has been made by the joint act of all the individual members, should one of those individual members be permitted to do (that is, sue on this note) that which he has jointly with his partner promised not to do? What has he done that entitles him to bring such suit? He has paid the note in the hands of the holder, and that is just what he, together with his partner, promised to do, and which, if he, or his partner, or both, had not done, and Sinex had been made to pay by the owner of the note, he could have been forced to pay by law to the extent of all his property liable to process. In the case of *Sparrow, Simpson, Walford, and Peckover v. Chisman*, 9 Barnwell and Cresswell, where one of several partners in a banking house drew a bill *in his own name* upon a third party, on the condition that the drawer should provide for the same when due, it was *held* that all the partners in the banking firm could not recover on the bill. Baily, Justice, in this case, says : " A party to whom an acceptance is given on a condition that he will provide for it when due, and who does not perform that condition, cannot sue the acceptor, and if Peckover, the party making the promise, therefore, could not have sued alone, how can he sue jointly with others? His partners, being bound by his acts, cannot recover through him." May we not ask, in reference to the case before us, if both partners made this promise not to sue, and both are bound by such promise as the act of the firm, how can one of these promisors sue individually?

It was the agreement not to hold him responsible for the payment of the notes which induced Sinex to give them ; this agreement and undertaking grows necessarily out of the transaction. Edwin Hall, by his authorized agent, was a

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party to that agreement, and cannot be permitted to contravene it.

This case may be placed in another point of view by applying to it a well-known principle of law applicable to promissory notes. Story on Promissory Notes, on page 517, in discussing the rights of an indorser who takes up or pays a promissory note, says: "If, indeed, any of those parties, either as maker or indorser, be such merely for his accommodation, then his claim is ended; for the payment has already been made by the very party who is ultimately bound to indemnify and reimburse all the others; and the law, to avoid circuitry of action, will treat it as a direct extinguishment." In this case, a member of a firm, Edwin Hall, finds a note going to protest on which he, as a member of the firm of Edwin Hall & Co., is liable to be held responsible. Not with a view to speculation, but as he himself says in his evidence in reference to the fourteen hundred and eighty-six dollar note: "As it had been discounted for the firm and bore our indorsement, I paid it;" and in reference to the thirteen hundred and eighty-six dollar note: "It bears our indorsement, and at maturity I paid it." He, as the representative of the firm, discharged a firm liability by paying this note. It is true, he can make his partner, E. M. Broomall, account with him for furnishing funds with which to satisfy a partnership debt; but the debt is no less satisfied as against the partnership, and as Edwin Hall was one of the accommodation payees liable to be sued and made responsible by Sinex, had he been forced to pay the note, it makes no difference whether this payment be considered a payment by the firm, or a payment by a member of the firm on behalf of the firm (if, indeed, such a distinction can be drawn).

As the law avoids all circuitry of action, the statement of the indisputable fact that Edwin Hall could, as a partner of the firm of Edwin Hall & Co., have been made liable to the extent of all he possessed to Jacob Sinex, the accommodation maker, had he been forced to pay these notes, seems to settle the question of Edwin Hall's right of suit. Authorities have

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been cited by the claimant's counsel to show that where there was a cross note, there was a consideration, and the cases, which, no doubt, are law, are sought to be applied to the question of the notes under examination.

This line of argument is inconsistent with the express and repeated declaration of counsel on both sides at the hearing, that these two notes were accommodation notes ; that is to say, that there was no consideration passing from Edwin Hall & Co. to Sinex for them.

Under these circumstances, even were it true in point of fact that Sinex gave a cross note of Edwin Hall & Co. in exchange for one or both of these notes, I could treat such cross note only as a means of indemnity received by Sinex in case he should be made liable on his notes to Edwin Hall & Co. ; any other view of the case would be inconsistent with the admissions that these notes were accommodation notes.

But there were no cross notes between these parties. The note given as an indemnity was the note of E. M. Broomall and not the note of the firm.

Nor was there any specific exchange of securities—each party holding himself and themselves liable on the paper primarily given by themselves as makers. There is no evidence whatever of this. There is no evidence whatever that Sinex desired or took the note of E. M. Broomall with a view of raising money upon it. As, then, they were not cross notes between the same parties, for their mutual accommodation, nor an exchange of securities between the same parties, and as the parties by their counsel admit that these two notes in question were accommodation notes, I am bound to treat them as accommodation notes.

The authorities therefore cited by the claimant's counsel in reference to the sufficiency of the consideration of a cross note, though no doubt law, are in no wise applicable to the facts of this case.

So, too, the authorities cited going to show that a *bona fide* holder of accommodation paper can recover against such accommodation maker or indorser although he knew at the

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time he took such paper that it was for accommodation only, are no doubt good authorities on that point. But the difficulty arises from their having no application to the facts of this case. If the holder, in all other respects, has a right to sue, the fact that he knew the paper to be accommodation, when he took it, does not destroy that right, but in this case Edwin Hall never had a right to sue, for he was one of the accommodation payees, and, having been paid by the parties, or one of the parties, ultimately liable to pay it, it was extinguished and its negotiable quality destroyed.

It is no doubt a hardship that Edwin Hall should be cheated by his partner. That is the result of misplaced confidence (too frequently happening among business men), when a little more care and caution would have avoided all the evil.

When Edwin Hall entered into partnership with E. M. Broomall, he gave him a letter of credit to the business world, and he plainly said to Jacob Sinex and all others doing business with the firm, Whatever arrangements you make within the scope of our partnership business I will ratify; and now, when the firm has through one of its partners, E. M. Broomall, accepted a favor, the loan of credit, which they made available and turned into cash, and made the arrangement not to call upon Sinex for the payment of the notes thus loaned, to permit either or both of those partners to sue Sinex would not only be destructive of the fundamental principles on which the liability of the partnership for the act of the individual member is based, but would be unjust and inequitable to Sinex in the highest degree—as he based his conduct on the promise of the partnership, through one of its members, that he would not be called upon for the payment of the notes. And further, Mr. Edwin Hall could not be permitted to contravene by his action now, that which he authorized his partner to do. If Mr. Sinex was deceived as to the wishes and desires of the partnership in giving these notes, Mr. Edwin Hall enabled E. M. Broomall to do so, by giving him the credit arising from this partnership relation with him. If

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there is hardship in the one case it is of Mr. Edwin Hall's own creation. The hardship in Sinex' case is one which arises not from any fault or negligence of his own, but from his trusting to the declarations of Edwin Hall that E. M. Broomall was a trustworthy man.

On no ground of law, nor from any considerations showing any equitable right in the matter, can these claims be sustained. The clerk will therefore enter an order that the claims aforesaid be disallowed and that the claimant pay the costs of the hearing of the rule.

UNITED STATES DISTRICT COURT—INDIANA.

When a debt from one partner to a bankrupt firm was incurred by the consent or privity of the other partners, proof of the joint creditors against the separate estate will not be admitted in a Court of Bankruptcy.

When all the assets of a bankrupt firm are expended in the payment of costs, and there is no fund to be divided among the firm creditors, the firm and individual creditors must be paid *pari passu* out of the separate estate of each partner.

Section 36 of the Bankrupt Act construed.

In re McEWEN & SONS.

HOPKINS, J.—The assignees have filed a petition in the interest of the firm creditors for the purpose of getting the instruction of the court upon the respective rights of the firm creditors of McEwen & Sons, and the individual creditors of William McEwen, one of the members of such firm. The petition is not very full, but I think presents the facts with reasonable certainty to enable the court to pass upon the main question sought to be determined. The individual creditors appear in opposition to the petition, and file a demurrer thereto. The assignees allege in their petition, first, that the firm assets will not more than pay the costs of settling the estate in bankruptcy; second, that William McEwen was indebted to the firm, as appeared by charges upon the books, to an amount exceeding three hundred thousand dollars. That the firm debts amount to over two hundred thousand dollars, and William's

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individual indebtedness to over one hundred and fifty thousand dollars, and that his separate estate was worth over two hundred thousand dollars, and that his sons, who were his partners, had no more property than to pay their private debts, from which it appears that the only estate in the hands of assignees for distribution among creditors is the private estate of William McEwen. The question raised and discussed on the hearing was, whether the firm creditors, upon the facts stated, were entitled to participate with the individual creditors in the distribution of the separate estate of William McEwen? In the first place, the assignees claim the right to prove the debt due from William to the firm, and in that way obtain a fund for distribution among firm creditors.

The petition does not show when the entries were made on the firm books, nor when the debt was created, nor does it show that William withdrew that amount, or any part of it, to defraud the firm creditors, or the members of the firm; nor does it show that the transaction was concealed from the firm, nor that it was not with the consent of all the members of the copartnership. Neither fraud nor collusion of any kind is alleged.

- Upon these facts, does that balance constitute a debt in favor of the firm against that partner, which the assignee of the firm can prove against him individually? I think, according to the authorities, it does not. The rule in bankruptcy may now be considered as well settled, that when the debt from one partner to the firm was incurred by the consent or privity of the other partners, that proof of the joint creditors against the separate estate will not be admitted in a Court of Bankruptcy. If the party acted fraudulently or with a view to augment his separate estate at the expense of the joint creditors, a different rule would prevail.

(Story on Part., Section 391; Gow on Part., 316; *ex parte* Smith, 1 Glynn & Jamison, 74; *ex parte* Harris, 2 Ves. & Beam, 209; *In re* Lane & Co., 10 N. B. R., 135.)

The principle upon which these cases rest is, I apprehend, that there can be no such thing as a debt between partners,

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or between an individual partner and his firm, in respect to partnership matters, until it is settled by a final winding up of the affairs of the firm; and Bankruptcy Courts have declined to go into such accounting upon the question of proof of debts in bankruptcy proceedings. So I must hold that neither the assignees of the firm, nor the firm creditors, have a right upon this ground to prove this claim against the private estate of William McEwen.

There is something like an allegation in the petition that the partnership between William McEwen and his sons was a sham, and made simply for the benefit of William, and to enable him to carry on his private speculations.

It is doubtful whether this question can be raised at this stage of the case. They have been treated as partners and adjudged to be bankrupts, as such partners, on the petition of the joint creditors. I doubt the right of the joint creditors to now turn around and allege that they were not such in fact; but if this is not so, I do not think the allegation to that effect sufficiently direct and positive to warrant the court in holding the fact to be admitted by the demurrer.

It seems to be stated inferentially, as the conclusion of petitioners from the other facts in the case, instead of an allegation of an existing fact.

This brings me to the consideration of the meaning of Section 36 of the Bankrupt Act, and which is altogether the most difficult question in the case. This petition alleges that the firm have no assets after paying costs of settlement of estate to distribute or divide among the firm creditors, which is admitted by the demurrer, and must be considered on this hearing as true.

If they have no assets, it has been settled, for this circuit at least, that the firm and individual creditors can be paid *pari passu* out of the separate estate. *In re Knight*, 8 N. B. R., 436. The counsel for the individual creditors contended that the allegation in the petition that the firm effects would not more than pay the costs was immaterial; that the question was, were there any firm assets? That if there were, it

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was unimportant whether they were to be applied to the payment of the costs, or distributed among the firm creditors. That in either case the firm creditors would be excluded from participation in the separate estate of William McEwen until after the payment of his individual creditors in full; that it was not essential that there should be a fund, exclusive of costs, to effect such result. If such is the meaning of the act, the firm creditors are without remedy, and may lose their whole demand, while the individual creditors of that member may get their pay in full.

The question is by no means free from difficulty. But after a thorough examination of the authorities upon the subject, I have arrived at a conclusion different from that contended for by the learned counsel for the individual creditors, on the argument. *In re Kahley* (6 N. B. R., 189, s. c., 3 Bissell's R., 169), I hold that the word "estate," as used in certain other sections, included the portion to be used in the payment of costs, as well as that to be divided among creditors. But the language of the portions of the act then under consideration differed materially from the language used in the 36th Section. That section requires the assignee to "keep separate accounts of the joint stock or property of copartnership, and of the separate estate of each member thereof, and then provides, that after deducting out of the whole amount received by such assignee, the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to the payment of the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to the payment of his separate creditors." And further provides, that the residue of either estate, after the payment of the debts in the order above mentioned, should be divided among the creditors, firm or private, as the case might be. I think the expression "net proceeds," shows that Congress had reference to the estate to be distributed among the creditors, and only meant to exclude one class in case there were some funds for distribution in the class to which such creditors belonged, so

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that, when all the assets are expended in the payment of costs, and there is no fund to be divided, as in this case, among the firm creditors, I think the firm and individual creditors are to be paid *pari passu* out of the separate estate of each partner. It then presents the case in the language of Judge Drummond, *In re Knight, supra*, "That being the only source to resort to for the payment of the debt of the firm, it should be appropriated as well to pay the debts due from the firm as from the individual members." What difference is there as to the firm creditors, between no assets and a case where assets are all used in payment of costs? If there is only property enough to pay expenses, they do not get anything; they have no source of payment except from the separate property.

So I think the just and equitable reading of the statute is that the creditors of a firm are excluded from participation in the separate estate of the members only when there is a fund to be distributed to them, to the exclusion of the individual creditors. That when neither has any advantage in a fund not alike applicable to both, they stand equal, and must be paid *pro rata*. In Story on Part., Section 380, it is stated that, "If there is any joint estate, however small it may be, if it is an *available* joint fund, and not purely a nominal joint fund, then the joint creditor is excluded; for example, if the joint fund is absolutely worthless from the expenses of any attempt to get it in, or if it is pledged beyond its real value, it will be deemed a nullity."

I think this language plainly indicates that a joint fund to exclude the firm creditors must be beneficial to them. If it costs more than it comes to to get it, it is in no sense an available joint fund within the authorities. See also Coll. on Part., B. 4. Ch. 2, Section 926. The Lord Chancellor, in *ex parte Peake*, 2 Rose, 54, where the answer to the petition of the firm creditors was that there were joint effects of one pound eleven shillings and sixpence, said "that joint effects to the value of five pounds or five shillings would be an answer to the application, but if the property alleged to exist was in such a situation that any attempt

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to bring it within the reach of the joint creditors must be deemed a desperate, or, in point of expense, an unwarrantable attempt, that would authorize a departure from the rule," and allow said creditors to prove notwithstanding such property. And Lord Chancellor Eldon, *ex parte* Hill, 5 Bos. and Pull., Note, 191, says, "joint effects means such as are under the administration of assignees to distribute." In *ex parte* Janson, 3 Maddock's R., 229, it is said, "The principle being that whilst there is any other fund, however small, to resort to, the joint creditors cannot prove against the separate estate of one of the parties who have become bankrupt."

These cases were decided under the English Bankrupt Law, which was similar in the respect under consideration to our own, and, therefore, are important as showing that the English courts recognize the exception to the statute rule in cases where there is no joint fund to resort to, or that is available to the joint creditors, and are very important in settling the proper construction of the section of the Bankrupt Act under consideration. That section lays down the general rule, but is to be regarded as subject to the exceptions above stated, and I think the facts alleged in petition bring this case within the doctrine of these authorities and cases.

The counsel for the individual creditors referred to *ex parte* Kenedy, 19 Eng. Law & Eq., 150, as laying down a different rule. That case does not appear to be supported by authority. The decision is based upon *In re* Bridge and G. & G. Keale, referred to in note. It does not appear that the court in that case decided this question. No opinion is given—simply the order of the court, and it might have been based upon the fact that there was other property besides, to wit, the "brig" therein mentioned, and so not have turned upon the question of costs, as claimed. But without further notice of that case, as it is in conflict with the general current of English cases, I cannot adopt its conclusions.

The case of Warwick, Davies' R., 229, cited to same effect by counsel, does not show that this question was raised, and therefore furnishes no support to this claim. I am also sup-

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ported in my conclusion by the case of *In re Jewett*, 1 N. B. R. 491; *In re Downing*, 3 N. B. R. 748; Bump on Bankruptcy, 188 and 189. As before stated, I have assumed the fact that the whole joint estate will be used in payment of the costs of the proceedings in bankruptcy, leaving no joint fund for distribution, or any funds to be marshaled. I have, as before stated, with considerable hesitation, come to the conclusion that the fund applicable to, and used in, the payment of the costs of the proceedings does not constitute a joint estate within the fair meaning of the Bankrupt Act, so as to deprive the firm creditors of participating with the individual creditors in the separate estate. To hold that a fund used in payment of necessary costs is to have the same effect upon the joint creditors' rights as if distributed among them, is, in my judgment, a very unjust and unreasonable conclusion, and I cannot upon principle or authority adopt it.

I therefore overrule the demurrer, with leave to the respondents to put in an answer within twenty days after notice of this decision. If they fail to do so, I direct an order to be entered herein that the individual creditors of William McEwen and the firm creditors of McEwen and Sons be paid *pari passu* out of the separate estate of the bankrupt William McEwen, in the hands of the assignees in this case.

Harrison, Hines & Miller, for assignee.

McDonald, Butler & Harrington, for individual creditors.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

The *fact* that a merchant or tradesman does not keep proper books of account is made by the Bankrupt Act a cause for refusing to discharge the bankrupt without any reference to the *intent*, whether fraudulent or otherwise.

In re ARCHENBROWN.

Mr. Burt, for the opposing creditor.

Mr. Dewey, for the bankrupt.

LONGYEAR, J.—The first specification is for omitting the

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opposing creditor's name from the schedule of creditors, and not for willfully swearing falsely to the schedule. In this it is fatally defective, but even if it had been properly framed, it was clearly not sustained by proofs. For both reasons, therefore, it is overruled without further comment.

The second and only other specification is for not keeping proper books of account, the bankrupt having been a merchant or tradesman. The object of the requirement of the act (Section 29) that merchants and tradesmen shall have kept proper books of account in order to be entitled to a discharge in case of bankruptcy, is that the debtor himself, or his creditors, might at any time ascertain his financial condition from an examination of his books ; and in case of bankruptcy to insure the entire appropriation of the debtor's property, not exempt, to the payment of his debts, and to enable the assignee to accomplish that end, and to assist him in the administration of the estate. The test as to whether the books which were kept, when, as in this case, some books were kept, were "proper" books of account, within the meaning of the act, is, whether a competent accountant could, from the books themselves, ascertain the debtor's financial condition. If that can be done, then the form in which they were kept is of no importance. *Hammond v. Coolidge*, 3 N. B. R., 273 ; *In re Bellis & Milligan*, *Ib.*, 496 ; *In re Solomon*, 2 *Ib.*, 285 ; *In re Gay*, *Ib.*, 358 ; *In re Schumpert*, 8 *Ib.*, 415 ; *In re Garrison*, 7 *Ib.*, 287 ; *In re Bartenbach*, 11 N. B. R., 61.

Archenbrown was a merchant tailor, and did work and sold goods both on credit and for cash. So far as the books kept by him of work done and goods sold on credit, I do not see as there is any just cause of complaint, although the accounts were kept in a loose and rather informal manner. For several months before his bankruptcy he kept no account of his business done for cash, and the account he kept previously is very unsatisfactory and quite unintelligible. It seems to have been a sort of running memorandum of work done, without any distinction as to whether it was for cash or on credit, and the item

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of cash received and cash paid out is often without any indication as to whether it was on account or how otherwise; and his accounts with his customers where a balance appears against them upon his books are very often marked "settled," without saying how, whether by note, cash, or barter. For a time he seems to have kept an account with his creditors—those of whom he purchased stock, but even this seems to have been discontinued for more than a year before his bankruptcy.

Without going further into details, it must suffice to say that his books do not come anywhere near to what would be the lowest degree of the list above laid down.

I am satisfied from the proofs that Archenbrow had no intent; in his failure to keep proper books of account, to defraud his creditors. Neither does it appear that any fraud upon or loss to creditors has resulted from it; but these elements do not enter into the calculation. The *fact* that he did not keep proper books of accounts is made by the act a cause for refusing to discharge, without any reference to the intent or the result. I am therefore constrained, however reluctantly, to refuse his petition for a discharge. In addition to the cases already cited, see *In re Littlefield*, 3 N. B. R., 57; *In re White*, 2 *Ib.*, 590; *In re Newman*, *Ib.*, 302; *In re Burgess*, 3 *Ib.*, 196.

Discharge refused.

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SUPREME COURT OF INDIANA.

O., the administrator of P., brought a suit on three promissory notes against M. as principal and J. as surety. J. was alone served with process, which was returned not found as to M. An appearance was entered for M. by mistake, and an answer filed, which was withdrawn, the appearance stricken out, and suit continued as to M.

A motion was made for a continuance, which was denied, the affidavit stated that M., the principal, was a material witness, that since the making of the notes he had been adjudged a bankrupt, and that the notes were barred as to him.

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The motion was overruled by the court below because M. was not a competent witness for J., and judgment was given against him.

Held, on appeal, that a discharge in bankruptcy does not *per se* operate as a discharge of all the bankrupts' debts, that the courts do not take judicial notice of discharges in bankruptcy, that, if not pleaded, a judgment may be rendered against an adjudged bankrupt, and M., as a party, was incompetent to testify against an administrator. That if the plaintiff had dismissed as to M., and taken judgment against J., the obligations being joint, the cause of action would have been merged in the judgment, and M. would have ceased to be a party within the meaning of the statute.

JENKS v. OPP, Administrator.

FROM the Tippecanoe Common Pleas.

H. W. Chase and *F. A. Wilstach*, for appellant.

F. B. Everett, for appellee.

BUSKIRK, J.—This was a suit by Opp, administrator of Porter, against James W. Moliere as principal, and Edward T. Jenks, as his surety, upon three joint promissory notes, made in 1866 to the intestate, all payable with ten per cent. interest, and the last maturing in March, 1867.

The appellant, Jenks, was alone served with process, which was returned not found as to Moliere. An appearance was entered for Moliere by mistake, and an answer filed; but, by leave of court, the appearance was withdrawn, and his answer was stricken out, and the suit continued as to him.

The appellant answered, First, By a general denial. Second, That payments were made from time to time upon the notes, under the name of interest, at the rate of twenty-four per cent. per annum, being usury corruptly contracted for and paid; and that other payments were made, a schedule of which payments is filed, showing such payments in all to be twenty-five hundred dollars, a sum more than sufficient to pay the notes in full with ten per cent. interest.

A reply in denial of the second paragraph of Jenks' answer was filed.

The appellant then presented an affidavit and made a motion for a continuance, which was overruled; and a trial was then had, which resulted in a judgment for the appellee against the appellant for thirteen hundred and sixty-three dollars, over the appellant's motion for a new trial.

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The affidavit for continuance is set out in the bill of exceptions, and the ruling of the court upon it presents the only point there is in the case.

The affidavit, which is in the form contemplated by the statute, states that Moliere, the principal in the notes, was a material witness for the affiant; that since the making of the notes, Moliere has been adjudged a bankrupt, under the Act of Congress of March 2, 1867, by the United States District Court, for the District of Michigan, and that the notes were barred as to him; that as soon as process was served on affiant, he commenced investigations to ascertain Moliere's residence, and that a day or two before the term of court commenced, affiant learned that Moliere had removed from his former residence at Dowagiac, Michigan, to Kalamazoo, in that State; that it was then too late to take his deposition or procure a certified copy of the bankruptcy proceedings, to show his competency as a witness; that as soon as Moliere's residence was ascertained, affiant went to Kalamazoo and saw Moliere, who promised to come to Lafayette as a witness; but affiant received a letter from him, on the day he was to have arrived, stating that he was sick and unable to come; that affiant believed that the sum of over eight hundred dollars of said notes was for usurious interest, and that Moliere could prove that over two hundred dollars of the same was usury, but just how much affiant could not state; and that there was no other witness by whom the facts could be proved, and that Moliere could be obtained by the next term, if the cause was continued.

The court overruled the motion, because, as the record states, "Said Moliere, although adjudged a bankrupt, since the making of the notes described in the complaint, and discharged therefrom, is not a competent witness for the defendant Jenks."

The statute upon the subject, which was construed by the court as excluding the testimony of Moliere, reads as follows: "Provided, That in all suits where an executor, administrator, or guardian is a party in a case where a judgment may render, ('may be rendered,') either for or against the

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estate represented by such executor, administrator, or guardian, neither party shall be allowed to testify as a witness unless required by the opposite party, or by the court trying the cause." 3 Ind. Stat., 561.

The only question in the case is, was the refusal of the court to continue the cause, for the reason stated, correct?

It is claimed, by counsel for appellant, that because Moliere has been discharged under the Bankrupt Law, he has no interest in the suit, and is therefore a competent witness for his surety upon the notes. Under our statute, the competency or incompetency of a witness is not made to depend upon his interest in the suit. All persons, even parties, are, as a general rule, competent witnesses. To this general rule, the statute has made certain exceptions; and one of them is, that in all suits where an executor, administrator, or guardian is a party, where a judgment may be rendered either for or against the estate represented, neither party shall be allowed to testify, unless required by the opposite party, or the court trying the cause.

This certainly is a suit by an administrator, and a case where a judgment might be rendered either for or against the estate represented. Moliere was made a defendant, but was not served. Was he a necessary party defendant? The action was based upon three joint promissory notes. Where the obligation is joint, all the makers are necessary parties; and, in this case, Moliere was not only a proper but a necessary party.

But it is insisted that he was not a necessary party because he had been adjudged a bankrupt.

A discharge in bankruptcy does not, *per se*, operate as a discharge of all his debts. The courts do not take judicial notice of discharges in bankruptcy. A discharge in bankruptcy must be pleaded, otherwise a judgment may be rendered against an adjudged bankrupt. It is a personal privilege, which the bankrupt may or may not set up as a defense to the action. The note of a married woman is void, yet, if

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when sued she fails to set up her coverture, a valid judgment may be rendered against her.

We think that Moliere was, by the express words of the statute and its spirit, an incompetent witness. The note sued upon was a joint, and not a joint and several obligation. There was a suggestion upon the record of not found, and a continuance as to him. As between Moliere and Jenks, the relation of principal and surety existed; but as between them and the payee, they were both principals. The appellee having sued both the joint obligors, taken process against both, suggested upon the record a return of not found, and continued as to Moliere, and taken judgment against Jenks, he may proceed under Section 641 of the Code, and have Moliere bound by the original judgment. *Erwin v. Scotten*, 40 Ind., 389. In such proceeding the judgment, if any, would be that Moliere should be bound by the original judgment.

If he should testify for the appellant, he would, in legal effect, testify for himself. The plaintiff having caused a suggestion of not found to be entered on the record, and taken a continuance as to Moliere, the rendition of a judgment against his co-obligor did not merge the cause of action in the action. If the plaintiff had dismissed as to Moliere, and taken judgment against Jenks, the obligation being joint, the cause of action against Moliere would have been merged in the judgment, and he would have ceased to be a party within the meaning of the statute. *Erwin v. Scotten, supra*. Moliere being a party to the action at the time he was offered as a witness, and the action being by an administrator, it results that he was an incompetent witness, and that the court committed no error in refusing to continue the cause.

The judgment is affirmed, with costs.

Pettit, J., having been of counsel, was absent.

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UNITED STATES SUPREME COURT.

The policy of the Bankrupt Law is *speedy* as well as *equal* distribution of the bankrupt's assets among his creditors, and the one is almost as important as the other. The delays in the inferior courts commented on. The clause limiting the commencement of actions by and against the assignee to two years after the right of action accrues, applies to all judicial contests between the assignee and any person whose interest is adverse to his.

Though this clause in terms includes all suits at law or in equity, the general principle applies here, that where the action is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, the bar does not commence to run until the fraud is discovered.

And this doctrine is equally applicable on principle and authority to suits at law as well as in equity.

JOHN F. BAILEY, Assignee of BENJAMIN GLOVER, Appellant, v. HUGH WEIR, NATHANIEL B. GLOVER, and ELENORA GLOVER.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

MILLER, J.—This was a bill in chancery, brought by the assignee of Benjamin Glover, a bankrupt, to set aside as fraudulent and void conveyances of real estate by the bankrupt to defendants. Their demurrer to complainant's bill was sustained because the suit was not brought within two years from the appointment of the assignee. This appeal is taken from the decree of the court dismissing the bill, and the sole question here is whether, on the case made by the bill, this decision of the Circuit Court was right.

The bill makes a very clear case of fraudulent conspiracy to defraud the only creditor of the bankrupt named in his petition. The mode of perpetrating this fraud was by conveying all his property, of which the bankrupt possessed a large amount beyond what was necessary to pay his debts, to Hugh Weir, his father-in-law, Nathaniel Glover, his son, and Elenora Glover, his wife.

These conveyances were made without consideration, and with intent to take the benefit of the Bankrupt Law, which he

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did very soon after these transactions, and procured his discharge.

At that time he was indebted to John A. Winston & Co. in the sum of ten or twelve thousand dollars, for which judgment had been obtained against him, and his only purpose was to evade the payment of this debt. The bill further alleges that said Benjamin Glover, the bankrupt, and said Elenora Glover, and Nathaniel T. Glover, and Hugh Weir, kept secret their said fraudulent acts and endeavored to conceal them from the knowledge of the assignee and of the said John A. Winston & Co., whereby they were prevented from obtaining any sufficient knowledge or information thereof until within the last two years; and even up to the present time they have not been able to obtain full and particular information as to the fraudulent disposition made by the said Benjamin of a large part of his property. This bill was filed January 20, 1873, the complainant was appointed assignee December 1, 1869, and the bankrupt received his discharge April 11, 1870. That W. Jones, surviving partner of John A. Winston & Co., in December, 1871, filed a petition in the District Court against the bankrupt in order to have his discharge set aside for this fraud, but before process could be served on Glover he died. These are the material allegations of the bill, and if true the whole scheme was a gross fraud, concealed by the defendants from the knowledge of the assignee and from Winston & Co., against whom the fraud was perpetrated. It also shows that this suit was brought three years and a few weeks after the complainant became vested with the rights of an assignee in bankruptcy in the case.

The 2d Section of the Bankrupt Act reads as follows :

“ The Circuit Court shall have concurrent jurisdiction of all suits at law or in equity, brought by the assignee, against any person *claiming* an adverse interest; or by such person against the assignee, touching the property of the bankrupt transferable to or vested in the assignee; but no suit at law or in equity shall in any case be maintainable by or against

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such assignee, or by or against any person *claiming* an adverse interest, touching the property or rights of property aforesaid, in any court whatsoever, unless the same shall be brought *within two years from the time of the cause of action accrued for or against such assignee.*"

Counsel for appellant argues that this provision of the statute has no application to the present case, because it is not shown that defendants have set up or *asserted any claim* to the property now sought to be recovered *adverse* to that of the assignee. It is rather difficult to see exactly what is meant by this proposition. The suit is brought to be relieved from some supposed claim of right or interest in the property on the part of the defendants. If no such claim exists, it does not stand in the way of complainant, and he does not need the aid of a Court of Equity to set it aside. If it is intended to argue that until some one asserts in words that he claims a right to property transferred to the assignee by virtue of the act, which is adverse to the bankrupt, the statute does not begin to run, though such person is in possession of the property, acting as owner, and admitting no other title to it, we think the construction of the proviso entirely too narrow.

This is a statute of limitation. It is precisely like other statutes of limitation, and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued, for or against the assignee. Such is almost the language in which the provision is expressed in Section 5057 of the Revised Statutes.

It is obviously one of the purposes of the Bankrupt Law, that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial

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attended by some necessary delay. Appeals in some instances must be taken within ten days ; and provisions are made to facilitate sales of property, compromises of doubtful claims, and generally for the early discharge of the bankrupt and the speedy settlement of his estate. It is a wise policy, and if those who administer the law could be induced to act upon its spirit, would do much to make the statute more acceptable than it is. But instead of this the inferior courts are filled with suits by or against assignees, each of whom as soon as appointed retains an attorney, if property enough comes to his hands to pay one, and then, instead of speedy sales, reasonable compromises, and efforts to adjust differences, the estate is wasted in profitless litigation, and the fees of the officers who execute the law.

To prevent this as much as possible, Congress has said to the assignee, you shall commence no suit two years after the cause of action has accrued to you, nor shall you be harassed by suits when the cause of action has accrued more than two years against you. Within that time the estate ought to be nearly settled up and your functions discharged, and we close the door to all litigation not commenced before it has elapsed.

But appellant relies in this court upon another proposition which has been very often applied by the courts under proper circumstances, in mitigation of the strict letter of general statutes of limitation, namely, that when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it.

This proposition has been incorporated in different forms in the statutes of many of the States, and presented to the courts under several aspects where there were no such statutes. And while there is unanimity in regard to some of these aspects there is not in regard to others.

In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the

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facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.

We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it, without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. (*Booth v. Lord Warrenton*, 1 Brown, Parl. Cases, 445; *South Sea Company v. Wymondsell*, 3 Peere Williams, 143; *Hovenden v. Lord Annesley*, 5 Schoale & Lefroy, 607; *Stearns v. Page*, 7 How., 819; *Moore v. Greene*, 19 How., 69; *Sherwood v. Sutton*, 5 Mason, 143; *Snodgrass v. Br. Bank at Decatur*, 25 Alabama R., 161.)

On the question as it arises in actions at law there is in this country a very decided conflict of authority. Many of the courts holding that the rule is sustained in courts of equity only on the ground that these courts are not bound by the mere force of the statute as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles. (*Troup v. Smith*, 20 Johns., 33; *Callis v. Waddy*, 2 Munford, 511; *Miles v. Berry*, 1 Hill's S. Carolina R., 296; *York v. Bright*, 4 Humphrey, 312.)

On the other hand, the English courts and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law. (*Bree v. Holbrech*, Douglas' R., 655; *Clarke v. Hougham*, 3 Dow. & Ryl., 322; *Granger v. George*, 5 B. & C., 149; *Turnpike Co. v. Field*, 3 Mass., 201; *Welles v. Fish*, 20 Mass., 73; *Jones v. Conoway*, 4 Yeates, 109; *Rush v. Barr*, 1 Watts, 110; *Idem*, 491; *Mitchell v. Thompson*, 1 McLean's Cir. C. R., 96; *Ware v. Hylton*, 1 Curtis, C. C., 220.)

As the case before us is a suit in equity, and as the bill

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contains a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which is sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity, but for the peculiar language of the statute we are considering. We cannot say in regard to this act of limitations that courts of equity are not bound by its terms, for its very words are that "no suit *at law or in equity* shall in any case be maintained * * * unless brought within two years," etc. It is quite clear that this statute must be held to apply equally by its own force to courts of equity and to courts of law, and if there be an exception to the universality of its language it must be one which applies under the same state of facts to suits at law as well as to suits in equity.

But we are of opinion, as already stated, that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side.

While we might follow the construction of the State courts in this matter, where those statutes governed the case, in construing *this* statute of limitation passed by the Congress of the United States as part of the law of bankruptcy, we hold that when there has been no negligence or laches on the part of

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a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

The result of this proposition is that the decree of the Circuit Court sustaining the demurrer and dismissing the bill must be reversed, with directions for further proceedings, in conformity to this opinion.

UNITED STATES DISTRICT COURT.—E. D. PENNSYLVANIA.

One member of a copartnership of banking firms termed a syndicate, having in its possession certain moneys belonging to the syndicate as the result of transactions on its account, became bankrupt.

Upon a statement of the accounts of the syndicate, it was ascertained, as alleged, that, including the said moneys as portion of the common fund for division among the respective constituents of the syndicate, there was due to the bankrupt firm a certain sum less in amount than the said moneys. Another member of the syndicate upon behalf of itself and its associates, sought to prove a claim against the bankrupt's estate for the whole of said moneys in the possession of the bankrupt firm, at the time of its failure, claiming dividends, however, on the same only until they should amount to the difference between the said sum and the portion of the profits to which the bankrupt firm appeared to be entitled, upon the statement of the account of all the profits of the syndicate, including the said moneys first mentioned.

Upon objection by the trustee of bankrupt's estate,

It was *held* that the proof could not be allowed for more than the difference between the bankrupt's share of the profits, and the amount claimed to be due by them at the time of the failure; and that an absolute allowance of proof for this amount, could not be sanctioned independently of any question of equalization or adjustment that might arise upon examining the final account of every one of the several firms of which the so-called syndicate was composed, with such syndicate, and comparing those several accounts with one another, and with the final account of the bankrupts.

Semble, that a partnership cannot prove against the estate of one of its members, except for a debt arising by fraud, as distinguished from contract.

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REPORT OF THE REGISTER.

To the Honorable John Cadwalader, Judge of the said Court:

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I, the undersigned Register in Bankruptcy, to whom the above matter was referred, respectfully report :

That, on the 17th day of March, 1874, on behalf of Jay Cooke, McCulloch & Co., and certain other banking houses composing a copartnership or association, known by the name of "Syndicate," a deposition was made for the proof of a claim against the estate of the said bankrupts, amounting to the sum of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents gold.

That on the 15th day of September, 1874, a deposition in amendment of the proof of said claim was made and filed.

On September 18th, following, the trustee of the said bankrupts' estate presented a petition for the re-examination of said claim as amended.

On September 22d, 1874, 11 A.M. Richard C. McMurtrie, Esq., appeared for the said claimants, and Richard L. Ashhurst and John C. Bullitt, Esqs., for the trustee. The objections set forth in the petition of the trustee were duly argued. The said depositions and petition are herewith forwarded.

The business of the said partnership or association was the negotiation of certain bonds of the United States. The agreement of the said banking houses with the Secretary of the Treasury of the United States is annexed to the second deposition.

It is alleged in said deposition, that it was the duty of each party to the agreement to pay into the hands of Messrs. Rothschild of London, one of the parties thereto, any money received in the business. That the business had at the time of the failure of the bankrupts been completed, and nothing remained but to settle the accounts of the parties concerned. That in the course of the business, Jay Cooke & Co. had in their possession, as the result of transactions for account of the syndicate, the sum of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents, gold. That there was in the hands of the syndicate a fund which were the profits of the concern, independent of the amount due from Jay Cooke & Co. That that sum was divided,

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and the amount that Jay Cooke & Co., and Jay Cooke, McCulloch & Co., would have been entitled to receive, had there been nothing due from Jay Cooke & Co., would have been each twenty-two thousand six hundred and twenty-three pounds, five shillings, eleven pence, or one hundred and eight thousand two hundred and twenty-two dollars and thirty-seven cents, gold. That the united shares of the profits of these two houses is less by seven thousand four hundred and thirty-eight pounds, nineteen shillings and two pence, than the amount due the syndicate from Jay Cooke & Co. That this division was made among the respective houses composing the syndicate, exclusive of Jay Cooke & Co., and Jay Cooke, McCulloch & Co., the latter assenting thereto, without, however, agreeing that it could be done lawfully. That there was no connection between Jay Cooke & Co., and Jay Cooke, McCulloch & Co., other than that between any other two parties to the syndicate contract. That on account of many of the partners in the one firm being also partners in the other, it was provided in the articles of copartnership of Jay Cooke, McCulloch & Co. that the profits of all business, which in its inception or completion should require the agency of both houses, should be equally divided between them, but that there was no agency assumed by either house for the other, in respect to the syndicate transactions. That of the sum of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents, gold, received by Jay Cooke & Co., as alleged, in order to pay the parties other than Jay Cooke & Co., and Jay Cooke, McCulloch & Co., their full share of the profits, seven thousand four hundred and thirty-eight pounds, nineteen shillings and two pence is required, and to pay Jay Cooke, McCulloch & Co. for its full share, twenty-two thousand six hundred and twenty-three pounds, five shillings and eleven pence, leaving with Jay Cooke & Co., also, the sum of twenty-two thousand six hundred and twenty-three pounds, five shillings, and eleven pence, or one hundred and nine thousand two hundred and twenty-two dollars and thirty-seven cents, gold.

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The claimants contend that they should be allowed to prove for the sum of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents, gold, and receive dividends thereon, until they shall have received the sum of one hundred and forty-six thousand two hundred and seventy-six dollars and sixteen cents, gold. To this the trustee has objected, and has replied that, had the syndicate made no such application of the profits, in payment of the claim, the share of profits due said bankrupts would have been applicable as a set-off to the said claim, and since they have expressly made such an application, the claimants cannot contend, that it is anything else than a payment of the claim, *pro tanto*, and therefore, a reduction of the claim to that extent; so that the total amount which Jay Cooke, McCulloch & Co., or the syndicate, can claim is one hundred and forty-six thousand two hundred and seventy-six dollars and fifteen cents, gold.

I can find no precedent or authority for the claim being made as set forth in the depositions by the syndicate, as a partnership, composed of the several banking houses, including that of Jay Cooke & Co., against the estate of Jay Cooke & Co., in bankruptcy. In the case of *Buckhause & Gough*, 10 N. B. R., 206, a firm of which only one of the bankrupts was a member, was allowed by its solvent partner to prove a debt against the bankrupts, contracted by them as a partnership with the other. Lowell, J. says, "I have often decided that equitable debts may be proved under our Bankrupt Act, and I am not aware that a contrary decision has ever been made. Holding this to be a debt in equity and finding the decisions in bankruptcy in favor of allowing its proof, I admit it, though without any intimation that as between one partner or any number of partners and the others, where there is no firm with a foreign member, the Massachusetts cases" (which appear not to permit such a proof) "may not express the true doctrine for this country." But this is not the present case, and the difference is expressly stated in the case just cited, as follows, "it cannot be denied that, in substance,

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a debt due from A and B to A and D is a very different thing from a mere overdraft by A from the funds of A and B. To refuse to notice the distinction, is to disregard the credit of D altogether."

The cases of *ex parte* Harris, 2 V. & B., 209, and *ex parte* Yonge, 3 V. & B., 31, seem to decide that a partnership or the assignee of the partnership, cannot prove against the estate of one of its members, except for a debt arising by fraud as distinguished from contract, as by an act against the expressed or implied contract, and without the expressed or implied authority of the copartner, as by an overdraft to increase the separate estate, or under circumstances implying fraud as for private purposes, without the knowledge, consent, privity or subsequent approbation of the other, inferred from his giving the whole control to his partner, but such form of proof seems to have been restricted to the case of a joint commission; for in *ex parte* Yonge the proof appears to have been made by the solvent partners and not on behalf of themselves and the bankrupt.

The question is perhaps one of form rather than substance, and is not important excepting in so far as error in form may tend to obscure a correct view of the substance. In *ex parte* Yonge, Lord Eldon states the case thus: "In bankruptcy there is both a legal and equitable jurisdiction, and previously to the bankruptcy the *Botfields* (the two solvent partners) might have filed a bill to compel *Slaney* (the bankrupt partner), to repay that money so fraudulently abstracted; that right can never be taken away from them by the bankruptcy of *Slaney*, and the fact that his separate creditors have a right to his separate estate, although in law the two solvent partners cannot strictly be creditors of *Slaney*; and although if all were solvent, the three could not maintain an action against one of them, yet, in equity, upon such a transaction the money so abstracted by that one is *the debt of the two, to be applied by them as trustees for the three*; and the bankruptcy would not alter that."

The depositions offered by the claimants do not set out any

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such case of fraud, and, therefore, the doctrine illustrated in the cases just cited affords them no assistance. The moneys for which the claim is made, are admitted to have come into the hands of the bankrupts in the course of the business. The counsel for the claimants has, however, ingeniously argued that, until the bankrupts have paid to the Syndicate the moneys received on account of its transactions, they cannot, nor can their creditors, receive any portion of the profits. That to allow the claimants to prove only for the difference between the profits as estimated upon the supposition of payment, and the amount actually received by the bankrupts, would be to allow the other creditors of the bankrupts to have all the benefit of the partnership with the claimants without having complied with its stipulations. It is further contended that, until the bankrupts have paid into the common fund the moneys received by them, there are no profits, or at least none to which the bankrupts can be entitled. But that, I think, is begging the question; for the receipt by one partner is the receipt of all, and, if the aggregate receipts, no matter whether in the hands of two or one only of the firm are greater than the expenses, and the capital contributed, there must be a resulting profit to the firm. That the one or the two, as the case may be, have the shares of the others as well as his or their own, does not affect the existence of that in which they, as well as he or they, are jointly interested. Upon the first consideration of the question I was inclined to favor the view of the claimants, and was influenced partly by the following course of reasoning: The measure of the claims against a bankrupt's estate must be in proportion to the contribution made thereto by the respective claimants. The estate may be regarded as a fund whose component parts consist of such contributions, which have become respectively proportionally diminished. That equality of distribution requires the preservation of the same relation of parts in the analysis as in the synthesis. That applying this to the present case the Syndicate must be considered as having contributed the sum claimed, and are, therefore, entitled to its proportion.

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ate share of the whole estate. That the interest of the bankrupts, whatever it may be, in the Syndicate property, was a matter of separate estimation, and to be rendered available only on the same conditions as would have been necessarily imposed on the bankrupts themselves had there been no bankruptcy.

But such a statement of the case I found to be erroneous in its postulate—that the Syndicate had contributed to the bankrupt's estate the sum named. Upon reflection I became satisfied that such was not its contribution. For the portion of said sum to which the bankrupts are admitted to be entitled, provided the whole amount be paid by them, is the exact measure of the contribution by the bankrupts *in the first place to the Syndicate*. The difference, therefore, is all that in point of fact has been contributed by the Syndicate, and the amount by which the bankrupt's estate has been augmented.

The 21st Section of the Bankrupt Act provides as follows :

“No creditor, whose debt is provable under this act, shall be allowed to prosecute to final judgment any suit at law or in equity, therefor, against the bankrupt,” “provided” “that, if the amount due the creditor is in dispute, the suit, by leave of the Court in Bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy.”

What could the claimants, upon the facts as stated, recover at law? (For, in the present condition of the partnership accounts, it would not seem to be necessary to resort to a Court of Equity.) Simply the balance due—no more. (See Addison on Contracts, 733, 734, 735, and the cases there cited.) Suppose the estate of the bankrupts should pay no dividend, and they are not discharged, the claim, as at present made, could not be sustained in a suit against them; judgment would be entered only in such amount as if paid by them, would give the claimants their share of the moneys received.

If a solvent partner pay all the partnership debts, his proof against the separate estate of his bankrupt partners

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cannot include the portion of the said debts which, upon a settlement of the accounts, would be properly payable by him. (See *ex parte* Watson, Buck., 449; *ex parte* Smith, *Id.*, 492; *ex parte* Plowden, 3 Mont. & A., 402; *ex parte* Moore, 2 G. & J., 166.) For, although the last case establishes a different rule as to the amount for which partners may prove as against the estates of their copartners than that laid down in the first two cases, yet in none do I apprehend is the partner proving allowed to include his own share of the indebtedness paid in the proof against the others or any one of them. Now the bankrupt partner, although liable to the joint creditors for the whole debt, is entitled to the benefit of the payment by his solvent partner to the amount of said solvent partner's liability, and by the decisions referred to he obtains it by deducting from the claim of the creditor the proportionate share of the liability of his solvent copartners, and the claim by the latter against him cannot be for more than the balance. Now the bankrupt's share in the profits of the firm is a benefit of the same nature, and arises from the contract of copartnership in the same manner, and in any claim against him by his copartners arising out of partnership transactions can be made available to him in the same way, to wit, by a reduction of that claim. In other words, if there is a joint loss and one bears it all, his claim can only be for that part which he should not have borne; and, *e converso*, if there is a joint profit and one receives it all, the claim of those who have received nothing can only be for what they should have received. Accordingly, in *ex parte* Tyrrel, Buck., 345, it was held that if, on the bankruptcy of one or several partners, the joint creditors are paid in full out of the joint estate, but upon taking the partnership accounts a balance appears to be due to the solvent partners, the surplus of the joint estate will be paid to the solvent partners in part payment of the balance due to them, with liberty to prove against the separate estate for the *difference*.

The counsel for the claimants has cited the case of *ex parte* Graham, 3 V. & B., 130, where it was held that the

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banker appointed under a commission of bankruptcy becoming bankrupt, his estate is not entitled to any dividend on a debt proved by him against the other, until full reimbursement of all property of that estate beyond the amount of his dividend, as analogous to the present question. This was held in *ex parte* Bebb, 19 *Ves.*, 222; *ex parte* Bignold, 2 *Mad.*, 470, and necessarily results from the principle that the assignees of a bankrupt are subject to all the same equities affecting the bankrupt's rights which could have been enforced against the bankrupt himself. (See *Grant v. Mills*, 2 *V. & B.*, 306; *ex parte* Hartop, 12 *Ves.*, 349; *Mitford v. Mitford*, 9 *V.* 87.) The debt due by a creditor of a bankrupt to the assignee, and the debt from the bankrupt to such creditor, cannot be said to be mutual—they are contracted *en autre droit*. In *ex parte* Graham, the banker to the commission, had he remained solvent, could not have set off his claim against the bankrupt in an action to recover the moneys deposited with him; and the rights of his creditors could be none other than his own. The claims of partners against each other are clearly the subject of mutual debt and credit, and bear no resemblance to the relations existing between a creditor of a bankrupt and one of their number to whom has been entrusted the moneys of the estate. I therefore reported that the claim of Jay Cooke, McCulloch & Co. and others, styled Syndicate, should be reduced as claimed by the Trustee to the sum of one hundred and forty-six thousand two hundred and seventy-one dollars and twenty-one cents, gold, being two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents (which, by reference to the account annexed to the first deposition, I think must be the correct amount, and not two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-three cents, which is probably a clerical mistake of transposition of figures) less one hundred and nine thousand two hundred and twenty-two dollars and thirty-seven cents, estimated share of profits of Jay Cooke & Co.

J. MASON, *Register in Bankruptcy.*

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CADWALDER, J.—The question is whether one hundred and nine thousand two hundred and twenty-two dollars and thirty-seven cents, the bankrupt's share of the profits of the joint concern, is to be deducted from the claim of two hundred and fifty-five thousand four hundred and ninety-three dollars and fifty-eight cents, before proof is allowed. The question answers itself. The proof cannot be allowed for more than the difference, one hundred and forty-six thousand two hundred and seventy-six dollars and fifteen cents.

By the Court :

The Register is instructed that the Court's order of yesterday does sanction an absolute allowance of proof of the amount of one hundred and forty-six thousand two hundred and seventy-six dollars and fifteen cents, independently of any question of equalization or adjustment that may arise upon examining the final account of every one of the several firms, of which the so-called Syndicate was composed, with such Syndicate, and comparing those several accounts with one another, and with the final account of the bankrupts.

UNITED STATES DISTRICT COURT—E. D. VIRGINIA

On the hearing of a petition in compulsory bankruptcy, when the debtor defendant declines to appear and defend in form, but is personally present, the court will hear a suggestion from any creditor, though it is a creditor who is charged with having received a fraudulent preference, that an insufficient number of creditors have joined in the petition.

When such a suggestion has been made, the court, if the bankrupt is relied upon to prove the insufficiency of the number of petitioning creditors, will require him to make his statement in writing, under oath, and accompany it with a list of all his creditors, and of the amounts due them.

If the examination into the question, whether a sufficient number of creditors have joined in the petition, has not been completed at the hearing on the day to which the order on the debtor defendant to show cause has been made returnable, and is continued until the next day, the defendant having been previously served personally with the order, and being personally present on the return day, and having failed on that day to demand a jury for the trial of the charges of acts of bankruptcy; in such a case, the defendant will not be allowed a jury if he demand one on the second day; that not being an "adjourned day" within the meaning of Section 41 of the Bankrupt Law (Section 5026 of the Revised Statutes at large).

In determining whether or not a sufficient number of creditors have joined

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in a petition, where it is proved that a preferred creditor had "reasonable cause to believe that the debtor was insolvent, and knew that a fraud upon the Bankrupt Act was intended," the court will throw out of the computation the claim of the creditor so preferred, at least as to a moiety of its amount.

G. D. W. CLINTON et al. v. D. C. MAYO.

Messrs. L. H. Chandler and James E. Neeson for the petitioning creditors.

Messrs. H. A. & J. S. Wise, and J. D. Christian, for the firm of M. E. McDowell & Co., creditors who had received a confession of judgment within three months of the filing of the petition.

The petition was filed on the 17th of March, 1875. It charged sundry acts of bankruptcy. Amongst those specified was the confession of a judgment for twenty-four thousand seven hundred and sixty-three dollars to M. E. McDowell & Co., of Philadelphia, on the 23d of January, 1875. The usual allegations were made as to fraudulent knowledge on the part of the plaintiffs in the judgment, and of insolvency on the part of Mayo, the debtor defendant.

A rule was given for a hearing on the 29th of March. On that day Mayo, though personally present, declined to enter a formal appearance, or to deny, by answer, the allegations of the petition. Thereupon, an order was entered treating as confessed, as to Mayo, the acts of bankruptcy charged in the petition, and leaving open only the question whether a sufficient number of creditors had joined in it.

The judgment creditors, in the judgment that had been confessed, were present by counsel, and suggested that the number of creditors required by law had not united in the petition; and asked that Mayo might be examined as to who were his creditors and the amounts due them.

It was contended by counsel for the petitioning creditors, that none could make the objection now made, of the lack of the required number of creditors as petitioners, save the debtor defendant himself.

The court allowed the debtor defendant to be examined,

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and while he was preparing his denial in writing that a sufficient number of creditors had joined, and preparing his list of creditors and the amounts due them, the examination was laid over until the next day, the 30th of March. On that day, the debtor defendant having changed his mind, asked leave to appear and file, *as his answer to the petition*, the statement which he had prepared in writing, denying all acts of bankruptcy; denying that a sufficient number of creditors had joined, and setting forth the names of his creditors and the amounts due them; and furthermore filed in writing a demand that the charges of acts of bankruptcy might be tried by a jury. The court refused to allow the writing to be filed as an answer, and treated its denial of acts of bankruptcy as surplusage; but accepted it as his testimony as of a witness called upon to give evidence by a creditor who had suggested that a sufficient number of creditors had not joined in the petition. The court also denied the demand for a jury. The examination was then (on the 30th of March) continued until the 5th of April, and personal notice ordered to be served by the Marshal on creditors not present, all of whom were residents of Richmond, except two whose claims were for less amounts than fifty dollars.

On the 5th of April the examination proceeded, and was concluded. The statement in writing submitted by Mayo, and his oral testimony, exhibited the following facts:

Aggregate claims of petitioning creditors, which	
each exceeded \$250.00.....	\$4,572 34
Claims of petitioning creditors which were less	
than \$250.00.....	1,785 52
Total claims of petitioning creditors.....	\$6,357 86
Aggregate claims of non-petitioning creditors, each	
greater than \$250.00.....	\$21,158 31
Aggregate claims of non-petitioning creditors, each	
less than \$250.00.....	287 37
Total claims of non-petitioning creditors.....	\$21,445 68
Total of all claims.....	\$27,803 54

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The claim of the preferred creditors, M. E. McDowell & Co., was eighteen thousand and sixty-two dollars and eighty-nine cents; and the act of bankruptcy charged, was a confession of judgment which had been given by Mayo to them for twenty-four thousand seven hundred and sixty-three dollars, upon which execution had been taken out. The lien of an execution has the effect, under the laws of Virginia, of divesting the title of the debtor in all personal property, to the amount of the debt, subject only to his right to certain poor debtor and homestead exemptions.

The following was the opinion and decision of the court on the several questions which arose in the examination :

HUGHES, J.—Before the amendment of June, 1874, there was substantially but one inquiry in adjudicating upon involuntary petitions in bankruptcy. It was, whether an act, or acts, of bankruptcy had been committed. The trial of that fact might be by jury, if seasonably demanded by the debtor defendant. The law in that respect remains as before. But the amendment of June, 1874, superadds another inquiry.

It gives jurisdiction in involuntary bankruptcy only in cases where a fourth in number and a third in value of the creditors unite in the petition.

Accordingly, there are substantially two charges in this petition :

First. That certain acts of bankruptcy have been committed ; and,

Second. That a fourth in number and a third in interest of the creditors have united in the petition.

The debtor was called upon to answer these charges on the 29th day of March. He declined, though personally present on that day, to formally appear and defend. The court, therefore, had nothing to do as to the first charge, but to take it for confessed that the acts of bankruptcy charged in the petition were committed, and treat that part of the petition as adjudicated.

But the amendment of June, 1874, now also requires that

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the court shall be "*satisfied*" that the number of creditors which has been stated shall have united in the petition; and provides that if the bankrupt deny the allegation of the petition in this respect, his denial shall be in writing; and he shall be required at once to file a schedule of all his creditors, ✓ and of the amounts due them. Then, if it appear to the court that the number having signed the petition is short of what is requisite, ten days are to be given the petitioners in which to add the proper number. I therefore required the debtor, Mayo, when called upon to testify as a witness, to put his denial in writing, under oath, and at once to file a list of his creditors and the amounts due them. ✓

As to the point insisted upon by counsel, that the creditors who have received a confession of judgment giving them a preference, should not be heard to make the objection of insufficiency in the number of petitioning creditors; it is true that they are not yet regularly in court, and will not be until either they shall have proved their claim, or a bill in Chancery shall have been filed to set aside their judgment; still, not only they, but any one may suggest at the return day of the order on the debtor to show cause, that the number of petitioners is not sufficient; and, either upon such suggestion, or *ex mero motu*, in order to be "*satisfied*" on that point, the court will call upon the debtor for a list of his creditors, and take any other evidence it can avail itself of on that subject. I accordingly did, at the suggestion of M. E. McDowell & Co., call upon Mayo for such a statement. ✓

The demand for a jury was not made by the debtor defendant, Mayo, on the return day of the order on him to show cause. He was present on that day, though he did not enter a formal appearance. The return of the Marshal on the order was that he had been served with a copy of it on the 20th of March. When such service has been made, and the debtor is present, the terms of Section 5025 of the Revised Statutes at Large do not authorize an "adjourned day" for the hearing of the petition; and, therefore, the terms of Sec-

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tion 5026 require that the demand in writing for a jury shall be made on the return day, and do not give that right on any other day.

I therefore denied the demand for a jury in writing on the 30th, which the law expressly required to be made on the 29th of March.

The single question now left in this case is, whether the debt of twenty-four thousand seven hundred and sixty-three dollars, for which the confession of judgment given on the 23d day of January, 1875, for the purpose of preferring M. E. McDowell & Co., is provable in whole, or for a moiety, and to be computed as to the whole or only as to half, *in this preliminary proceeding*. Before the amended Bankrupt Act of the 22d of June, 1874, if the claim of a creditor were doubted by the judge or disputed, especially a claim for which a creditor had accepted a preference, it was postponed, and could not be proved until after an assignee was appointed. There was then no provision in the Bankrupt Law requiring that any specific number of creditors should join in a petition in involuntary bankruptcy; and no computation was necessary of the number of creditors, which could be affected by postponing the proof of the claim.

Before the Amendment of June 22, 1874, requiring a specific number of petitioning creditors to join in such a petition, there was no provision in the 39th Section authorizing or requiring the court to pass upon the question, whether a preference had been given in fraud of the provisions of the Bankrupt Act, in adjudicating upon the petition in involuntary bankruptcy; because it was then unnecessary to give it that power. But when the Amendment of June 22, 1874, was passed, an additional clause was added to the 39th Section, immediately following the clauses requiring a specific number of creditors to join in the petition; which clause was, in fact, made necessary by that amendment. That clause empowers the court, at the time of ascertaining whether one-fourth in number and one-third in amount of creditors had joined in the petition, to decide, *pro hac vice*, whether the preferred

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creditor had had "reasonable cause to believe that the debtor was insolvent ; and knew that a fraud upon the Bankrupt Act was intended."

I say it was necessary to add this clause to the 39th Section, and to give this power to the court, at least for the purposes of adjudication. I do not pretend that the decision of this court on this question, in this preliminary stage of the proceeding, is final and conclusive as against the parties to the preference ; but a decision is necessary, and is final, so far as the preference affects the jurisdiction of the court to adjudicate upon the petition. If the court did not have this power, all that it would be necessary for any creditor and a colluding insolvent to do to defeat the proceeding in bankruptcy, would be to arrange a confession of judgment for a sum so large as to exceed by double the aggregate claims of *bona fide* creditors. The validity of the confession of judgment now under consideration being the only question left in this case, what are the facts in regard to it? The debtor defendant Mayo is made a witness and put upon the stand by M. E. McDowell & Co. He proves that M. E. McDowell, the senior partner, "was a whole week, till Friday, January 22, 1874, examining Mayo's affairs, and that it appeared upon the examination of his accounts, that his assets were less than his liabilities." He proves that this appeared at the examination in his factory, when Mayo's liability to McDowell & Co. was ascertained on that Friday, January 22, 1875, to be less than sixteen thousand dollars. He proves that on the next day, McDowell & Co. took a confession of judgment from him for twenty-four thousand seven hundred and sixty-three dollars. He proves, also, that on the day of confessing the judgment for this larger amount, he asked McDowell & Co.'s counsel, in the presence of M. E. McDowell, whether this confession of judgment would be an act of bankruptcy, and that this counsel (who did not seem to know of the previous examination of his affairs by McDowell, which had disclosed to him Mayo's insolvency), advised him to consult his own counsel ; but stated that the amount for which the judgment

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was to be confessed was too large to allow of the remaining creditors taking steps in bankruptcy.

Do these facts, proved by the witness whom McDowell & Co. themselves put upon the stand, show that that firm "had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on the Bankrupt Act was intended?" Certainly they had reasonable cause to believe Mayo's insolvency, for they knew that he was insolvent by a long familiarity with, and a recent week's examination of his affairs.

Did they also know that Mayo intended a fraud upon the Bankrupt Act? A fraud upon that act is an effort to defeat its objects. The leading object of that act is to secure a *pro rata* distribution among creditors, of the estate of the bankrupt. This confession of judgment could not but defeat that object, and could not but have been intended to defeat that object by Mayo; and M. E. McDowell could not but have known that that was Mayo's intention. If, then, it be a maxim of law that no man shall be allowed to take advantage of his own wrong; and if it be true that a fraud upon a statute cannot be allowed to defeat the purposes of the statute, am I at liberty to treat this claim of McDowell & Co. as a provable debt for the purpose of defeating the jurisdiction of this court in this proceeding?

It is not necessary for me in determining the question now before the court, to pass upon the question of "actual fraud." There is a distinction between fraud upon the Bankrupt Act, and "actual fraud." Taking a preference from an insolvent, knowing him to be an insolvent, is a fraud upon the act; though it may be honest in a merely moral point of view. But if a confession of judgment were taken in this case for twenty-four thousand dollars when the amount really due was only sixteen thousand dollars, then there would have been "actual fraud."

I cannot at this stage of the case try the question of "actual fraud" in the meaning of the clause of the 39th Section, running in these words: "And such person, if a creditor,

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shall not, in cases of *actual fraud*, be allowed to prove for more than a moiety of his debt." That question must be tried and determined at a future period, under a plenary proceeding in chancery; and I expressly disclaim passing now upon the question of "actual fraud."

But, for the purpose of determining the jurisdiction of the court, I am obliged to deal with the confession of judgment at once, so far as to decide whether or not it was a fraud upon the Bankrupt Act. Upon the evidence of Mr. Mayo I feel bound to decide that it was. If so, it cannot be computed in estimating the aggregate provable claims against the debtor, at least as to half of its amount.

The Amendment of June, 1874, and Section 23 of the original act, must be taken together. Section 23 does not use the word "fraud." It simply declares that a preference taken from a debtor, when reasonable cause existed for believing that he was insolvent, shall not be proved, etc., until the preferred creditor has surrendered the property received under the act of preference. The same section provides that where the validity of any claim is doubted by the judge, the proof of it shall be postponed until the appointment of the assignee; which is as much as to say that the debt is not *provable* at the date of adjudication, in whole or in part. The clause last quoted from the 39th Section provides that a creditor guilty of "actual fraud" shall not be allowed to prove for more than half of his debt; but if the 23d Section is to stand, this proof for the moiety of the debt is not admissible until after the assignee is appointed. I think, therefore, that this debt cannot be received or counted as proved or as provable until after the assignee shall have been appointed. A doubtful claim cannot be considered as provable until after it has been proved. For the purpose of determining the jurisdiction of the court, I must refuse to treat the claim of McDowell & Co. as *provable* until it is *proved*, in pursuance of the provisions of the 23d Section. Whether it will then be provable in whole, or only for a moiety, is not material to the question now to be decided, inasmuch as the number

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of petitioning creditors is sufficient to give jurisdiction to the court to adjudicate upon this petition, in either event.

I decide, therefore, that a sufficient number of creditors have joined in the petition, and that an order of adjudication must be made.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

Specifications were filed in opposition to the bankrupts' discharge before the passage of the amendments of June 22, 1874. After their passage the bankrupts demurred to the specification charging non-compliance with Section 33, of the Bankrupt Act of 1867, commonly called the "fifty per cent. clause;" Also to the one charging that the bankrupts, being insolvent, with intent to prefer said opposing creditor made an assignment for his benefit. *Held*, that the demurrer was well taken to both these specifications, and that they should be stricken out

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THE bankrupts were adjudicated, on petition of creditors, July 18, 1870, and specifications were filed by one creditor before the passage of the amendments of June 22, 1874. After their passage bankrupts demurred to the one charging non-compliance with the requirements of Section 33, known as the "Fifty per cent. clause," and also to the one which charged that, bankrupts being insolvent, etc., with intent to prefer said opposing creditor, made an assignment for his benefit.

A. S. Bradley, for the bankrupts, who cited *In re Griffith*, 10 N. B. R., 456; *In re Perkins*, 10 N. B. R., 529; *In re King*, 10 N. B. R., 566. And as to the second point, *In re Schuyler*, 2 N. B. R., 549; also, the maxims of the Civil Law, that no one can derive aid from his own wrong, or better his condition thereby; and of the Common Law, "*Ex turpi causa, aut ex dolo malo, non oritur actio. In pari delicto potior est conditio defendentis.*"

W. F. Becker, for the creditor, cited, *In re Francke*, 10 N. B. R., 438. Contending that, since a creditor who had taken his debtor's property on legal process could throw him into bankruptcy for that act, he might oppose his discharge for acts in which he had participated. *BLODGETT, J.*, sustained the demurrer on both points, and struck out the specifications.

In re Handlin & Venny.

UNITED STATES CIRCUIT COURT—E. D. ARKANSAS.

Under the Bankrupt Act (Sections 14 and 36) and the Constitution of the State of Arkansas of 1868 (Art. 12, Sec. 1), bankrupts who are co-partners are not entitled to separate or individual exemptions out of the partnership effects.

In re HANDLIN & VENNY.

PETITION for review under Section 2 of the Bankrupt Act.

This case came before the court on a question as to the right of persons composing a bankrupt firm to claim individual exemptions out of partnership effects.

The individual schedule of each of the partners discloses personal property of Handlin to the amount of five hundred and thirty-two dollars and eighty-five cents, and of Venny to the amount of one hundred and fifty dollars.

The partnership schedule discloses personal property sufficient to make up the sum of two thousand dollars claimed by each of the partners.

This latter sum is the amount allowed to "any resident" of the State of Arkansas as exempt from execution or other final process, by the exemption laws of the State, as they existed in the year 1871. (Sec. 1, Art. 12, of the Constitution of 1868.)

Each of the partners claims as follows:

Handlin, fourteen hundred and sixty-seven dollars and fifteen cents, which, added to his five hundred and thirty-two dollars and eighty-five cents, amounts to two thousand dollars.

Venny claims eighteen hundred and fifty dollars, which, added to his one hundred and fifty dollars, amounts to two thousand dollars.

Hubbard Stone, the assignee of said bankrupt estate, refused to allow the fourteen hundred and sixty-seven dollars and fifteen cents and the eighteen hundred and fifty dollars claimed, and on the 20th of February, 1875, set apart as exempt, and issued certificates as follows: To Handlin spe-

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cified articles of personalty to the value of five hundred and thirty-two dollars and eighty-five cents. To Venny the same kind of property, amounting to one hundred and fifty dollars, being the personal property shown by the schedules of each to be their individual property respectively.

To this action of the assignee the bankrupts, by attorneys, excepted, and the matter was brought before the District Court upon the statement of facts herein set forth.

Whereupon the action of the assignee, as aforesaid, was by the court disapproved and set aside, and the assignee was *pro forma* ordered to allow to each of the bankrupts, Handlin and Venny, the balance claimed by each of them as above stated, out of the partnership effects. The order of the court was as follows: "The assignee is directed to allow to each of the bankrupts, out of the partnership effects, a sum which, added to their respective individual effects, will give to each an exemption of personal effects to the value of two thousand dollars." The assignee excepted, and now brings the matter before the Circuit Court on a petition for review.

It was admitted that the bankrupts comprised all the members of the firm; that they were adjudged bankrupts on their own petition prior to the taking effect of the Constitution of the State of 1874, and while Section 1, Article 12, of the Constitution of 1868, was in force, and that neither of them had a homestead, or claimed a homestead exemption.

Dodge & Johnson, for the assignee.

N. & J. Erb, for the bankrupts.

DILLON, C. J.—The Bankrupt Act (Section 14), after excepting from its operation the household and kitchen furniture, and other articles and necessities of the bankrupt, not exceeding in value in any case the sum of five hundred dollars, also excepts "such other property not included in the foregoing exceptions, as is excepted from levy or sale upon execution or other process by the laws of the State in which the bankrupt has his domicile.

The Constitution of the State of 1868, in force until after

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the bankruptcy here in question, contained this provision: "The personal property of any resident of this State, to the value of two thousand dollars, to be selected by such resident, shall be exempted from sale on execution or other final process of any court, issued for the collection of any debt contracted after the adoption of the Constitution (Article 12, Section 1). This provision is self-executing (*In re Hezekiah*, 11 N. B. R., 573; s. c., 2 Dillon, 551).

The bankrupts were copartners, and were adjudged bankrupts as such. One of them had individual assets to the amount of five hundred and thirty-two dollars and eighty-five cents, and the other to the amount of one hundred and fifty dollars. The firm assets amounted to several thousand dollars, but not enough to pay all the firm debts. Each of the bankrupts claims out of the firm assets a sum sufficient, with the individual property set apart to him, to give him an exemption of personal effects to the value of two thousand dollars. This claim was sustained *pro forma*, by the District Court, and the assignee contests its rightfulness.

Upon the best consideration I have been able to give to the subject, my conclusion is that the claim of the bankrupts in this behalf cannot be sustained. This opinion rests upon the language of Sections 14 and 36 of the Bankrupt Act, and of the constitutional provision above quoted, upon the general principles of the Bankrupt Law, and the law of partnership, and upon the weight of authority upon the subject. Whatever property is exempted by Section 14 of the Bankrupt Act, is excepted from the operation of the act, and the title to it does not vest in the assignee. This is not denied, and has frequently been decided.

Section 36 relates to the bankruptcy of partnerships, and contains the provision that when persons who are partners in trade are adjudged bankrupt, "a warrant shall issue, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners shall be taken, *excepting such parts thereof as are hereinbefore excepted.*" That is, *all* of the firm property is to be seized on

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the warrant, and all of the individual property of the partners except such of the individual property as is exempted to the partners severally. And the further provision is that after deducting expenses and disbursements, "the *net proceeds* of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors," etc.

Taken all together, this language does not contain anything to favor, but much to contravene, the notion that individual exemptions should be allowed out of the partnership estate. And the same observation applies to the language of the constitutional provision. This contemplates a selection by the debtor from *his own*, and not partnership property. But, conceding that the language of the Bankrupt Act and of the Constitution of the State is not so clear to this end as to exclude doubt, the general principles of the law are against the existence of the exemption claimed. Where, as in this case, the partnership and all its members are declared bankrupt, the firm is treated as being dead, except to close up its affairs. There is no exemption to the firm as such, nor is it contended that there can be.

But each of the partners claims an individual exemption to the amount of two thousand dollars out of the firm property, and at the expense of the firm creditors; and if the claim is valid it would equally be so if there were six partners instead of two. It is a claim not depending upon the amount of capital which the partner making the claim contributed to the firm, or upon the state of the accounts between him and his copartners. He may never have put a dollar of capital into the firm, or he may have drawn out all his capital and owe the firm, yet it is insisted that not only as against his copartners, but as against the creditors of the firm, he may, in default of not possessing individual estate, lay his hand upon two thousand dollars of the joint estate, and appropriate it as exempt. This, I am sure, he could not do before bankruptcy without his copartner's consent, and after the bankruptcy,

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the copartner is incapable of giving any consent to affect rights fixed by that event.

The pretension set up in this case, whether considered with reference to the rights of copartners or the rights of the firm creditors, cannot be maintained. The case may be different as to mere joint ownership where no partnership relation existed, but it is not necessary to consider this point.

While the adjudged cases relating to the question under consideration are not uniform, a careful examination of all of them justifies me in saying that they are quite decisively against the proposition that individual exemptions can be allowed out of the partnership estate at the expense of the joint creditors (*Pond v. Kimball*, 101 Mass., 105; *Guptil v. McFee*, 9 Kansas, 30—a well-considered case, following *Pond v. Kimball*, and disapproving *Stewart v. Brown*, 37 N. Y., 350; *Burns v. Harris*, 67 North Carolina, 140; *Bonsall v. Comly*, 44 Pa. St., 442, 447; *In re Blodgett & Sanford*, 10 N. B. R., 145; *In re Hafer*, 1 N. B. R., 547; *Amphlet v. Hibbard*, Sup. Ct. Mich., 1874; *In re Price*, 6 N. B. R., 400; *Wright v. Pratt*, 31 Wis., 99. *Contra*: *In re Young*, 3 N. B. R., 440; *In re Rupp*, 4 Ib., 95; *Stewart v. Brown*, 37 N. Y., 350; *Radcliffe v. Wood*, 25 Barb., 52; *In re McKercher & Pettigrew*, 8 N. B. R., 409.

Reversed.

SUPREME COURT—GEORGIA.

C. brought a suit against the Express Company to recover damages for loss of goods. The defendant pleaded in abatement, that since the commencement of the action, C., as a member of the firm of M. C. & Co., had filed his petition in bankruptcy, that this suit was embraced in his schedule of assets, and that a trustee had been duly appointed.

The defendant requested the court to charge the jury, that "If they find for the plaintiff, to render their verdict for the use of Gabriel Zeigler, the trustee, if the evidence shows that he was appointed trustee, and this claim was among the assets transferred to him, and it does not appear that a transfer to the plaintiff has been made with the consent of the committee appointed under the proceedings in bankruptcy."

The jury found for the plaintiff.

Held, that the verdict as it stands cannot endanger the rights of the Express

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Company, for if the trustee be the only person to whom the money can be legally paid, then a payment to him would be a discharge of the debt. That the Express Company or the trustee can have whatever rights either may have, fully protected by taking the proper steps for that purpose.

THE SOUTHERN EXPRESS COMPANY v. CONNOR.

CONNOR brought suit against the Southern Express Company for fifteen hundred dollars damages, alleged to have been sustained on account of the negligent loss of goods by the defendant, which it had contracted to transport from the city of Savannah, in the State of Georgia, to the city of Columbus, in said State.

The defendant pleaded in abatement, that since the commencement of said suit, to wit : on December 26th, 1868, the said plaintiff, for himself, and as a member of the firm of M. Connor & Company, filed his petition in bankruptcy in the United States District Court, for the Southern District of Georgia, and in his schedule of assets was embraced the suit aforesaid ; that under said proceedings in bankruptcy, Gabriel Zeigler was appointed trustee by order of the Bankrupt Court, and on April 16th, 1869, all the right, title, and interest of said plaintiff in the suit was conveyed to said trustee for the benefit of the individual creditors of the plaintiff, as well as of the creditors of the aforesaid firm of M. Connor & Company ; that said suit is being now prosecuted by the plaintiff against the consent of said trustee, for his individual benefit, in violation of said trust, and in fraud of his creditors.

The defendant filed, also, the general issue. What disposition was made of the plea in abatement, the record fails to disclose ; but it is to be inferred that it was stricken out on demurrer, leaving the case before the jury on the second plea.

So far as the question of the bankruptcy of the plaintiff is concerned, which is the only point now involved in this case, the evidence shows the facts to be as stated in the plea, with this exception : that the charge that the suit was proceeding in the name of the plaintiff without the consent of the trustee, was untrue, for the testimony demonstrated the very reverse

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to be the fact, to wit: that the trustee agreed with the plaintiff that he should proceed with the suit for his own benefit, if he would turn over to said trustee a certain note, to which condition the plaintiff assented.

The defendant requested the court to charge the jury as follows: "If they find for the plaintiff, to render their verdict for the use of Gabriel Zeigler, trustee, if the evidence shows that said Gabriel Zeigler was appointed trustee, and this claim was among the assets transferred to him, and it does not appear that a transfer to the plaintiff had been made with the consent of the committee appointed under the proceedings in bankruptcy."

The court refused so to charge, and the defendant excepted. The jury found for the plaintiff one thousand and seventy-six dollars and fifty-two cents.

The defendant assigns error upon the aforesaid ground of exception.

R. J. Moses, for plaintiff in error.

Henry L. Benning, Peabody & Brannon, Joseph F. Pou, for defendant.

TRIPPE, J.—The trustee selected by the creditors was aware of the pendency of the suit in the name of the bankrupt, and consented that it should proceed in the name of the original plaintiff. No exception was taken to the court's allowing the case to be tried as it was instituted.

The objection is, that the judge refused to charge the jury that if they rendered a verdict against the defendant, it should be for the use of the trustee. Beside the anomaly of a verdict being for one, or for his use, who is not a party of record, we do not think the verdict, as it stands, can endanger the rights of the plaintiff in error.

If the trustee be the only person to whom the money can be legally paid, then a payment to him would be a discharge of the debt. In any event, the defendant in the judgment or the trustee, can have whatever rights either may have, fully protected by taking the proper steps for that purpose. There

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need be no danger of paying the debt twice, and that seems to be all that is apprehended.

Judgment affirmed.



UNITED STATES DISTRICT COURT—NEW JERSEY.

A loss upon a policy issued by a Fire Insurance Company, happening after such company is thrown into bankruptcy, and before the final dividend, is a debt provable against such company.

AMERICAN PLATE GLASS AND FIRE INSURANCE COMPANY.

NIXON, J.—The question presented to the court under the proceedings in this case is, whether a claim against a bankrupt Fire Insurance Company is provable for the amount of a loss on a policy of insurance, which occurred after the proceedings in bankruptcy had commenced.

This depends obviously on the construction to be given to the fourth clause of the 19th Section of the Bankrupt Act, to wit:—"In all cases of contingent debts and contingent liabilities, contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend."

When we have ascertained what is here meant by "contingent debts and contingent liabilities," there is nothing left in the clause for construction. Is a policy of Fire Insurance a contingent debt, or contingent liability of the party which issues it?

It certainly is not a debt in any proper sense of the term. It is a contract—an agreement of indemnity, on the part of the insurer, to make good the insured against loss from fire, of certain property described in the policy. It does not become a debt until the contingency happens on which a de-

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mand for indemnity can be made, and the amount of the loss is ascertained.

But it is, as certainly, a *contingent liability*. The party accepting the consideration and issuing the policy becomes liable for the payment of a sum of money upon the happening of an uncertain event.

A careful examination of the American and English cases, shows that debts payable on a contingency, and contingent liabilities, which may never become due, are not provable against a bankrupt estate; because, whilst they exist in that condition, they are not susceptible of valuation. But the reason ceases in the case of a policy of insurance as soon as the contingency or loss happens, on which a demand for payment can be based.

An express provision for a claim of this sort was made in the 39th Section of the Bankrupt Act of April 4, 1800, where it was enacted that "the assured in any policy of insurance shall be admitted to claim, and after the contingency or loss, to prove the debt thereon, in the like manner as if the same had happened before the issuing the commission; and the bankrupt shall be discharged, as if such money had been due and payable before the time of his or her becoming bankrupt."

The 5th Section of the Bankrupt Act of August 19th, 1841, was probably intended to have a broader scope. It provided that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right when their debts and claims become absolute, to have the same allowed them."

It was accordingly held by the Supreme Court in *Mace v. Wells*, 7 How., 272, that under this section, the surety of the bankrupt on a promissory note, had a right, in consequence of his mere liability to pay, to prove the demand against the maker, who had become bankrupt; and that his failure to

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make such proof did not entitle him to recover the money subsequently paid by him, although he did not make the payment until after the bankrupt's discharge.

The principle of the decision undoubtedly was, that the amount of the demand was capable of being ascertained, and hence became provable within the provisions of the law.

It was afterwards held in *Riggin v. Maguire*, 8 N. B. R., 484, s. c. 15 Wall., 549, that under the same section, so long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable.

The 19th Section of the present Bankrupt Act, after providing for the proof of all debts due and payable from the bankrupt at the commencement of proceedings against him, and all debts then existing, but not payable until a future day; and for all claims against him as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or other contract, or for any debt of another person, although his liability did not become absolute until after adjudication, then authorizes a creditor to make his claim for any other contingent liability, and accords to him the right to share in the dividends of the estate, if the contingency upon which the same becomes payable happens before the final dividend.

I do not see any reason to doubt that this clause means what it says, and that under it a policy holder may claim for the full amount of his policy against the bankrupt company before any loss occurs. The claim thus put in is not susceptible of valuation, and all payment upon it must be postponed until the loss occurs. If none occur before the final dividend, nothing becomes due upon it. But if the contingency happen, to wit, a loss on the insured property before that date, the claimant is permitted to participate in the dividends of the estate, in the aggregate of his loss, whether total or partial, limited only by the amount of his policy.

It is, therefore, the opinion of the court that the claimant in this case is not excluded from proving his claim, from the

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fact that the loss occurred after adjudication, but before the final dividend.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

Where no assets have come to the hands of the assignee, an application by the bankrupt for his discharge which is made more than one year after the date of the adjudication in bankruptcy, will be refused, as this condition is not permissive only, but imperative.

This limitation applies with equal force to all classes of bankrupts, whether to those in which a discharge can be applied for within sixty days, or otherwise.

In re FRANKLIN A. SLOAN.

UPON the return day of an order to show cause why the bankrupt should not be discharged from his debts, certain of his creditors appear, and upon showing to the court that no assets have come to the hands of the assignee herein, object that inasmuch as the application was not made within one year from the adjudication of bankruptcy, no discharge should be granted.

WALLACE, J.—The language of the 29th Section of the act, which controls the decision of the question now involved, is somewhat ambiguous, and has been the subject of conflicting constructions in several cases where it has been passed upon by the courts. For the purpose of the present application, however, a construction must be adopted in conformity with that adjudged to be correct in cases which have been decided in both the District and the Circuit Courts for this District.

It was held by my learned predecessor that in all cases an application for a discharge must be made within the year from the adjudication. (*In re Wilmott*, 2 N. B. R., 214.) A different conclusion was reached, however, by Judge Nelson, in the Circuit Court, upon review of a decision by the District Court for the Southern District of New York, and it was held by him that it is only in cases where the application can

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be made after sixty days from the adjudication that it must be made within a year. (*In re Greenfield*, 2 N. B. R., 311; *In re Martin*, 2 N. B. R., 548.) I confess I am unable to appreciate any reason that prompted a distinction to be made in the section for the purpose of compelling one class of bankrupts to apply for a discharge within a year, while granting to another class an unlimited period. There is great propriety in requiring the privilege to be exercised within a reasonable time, because a creditor who desires to oppose can only do so when the bankrupt chooses to move; and if an unlimited time is permitted the bankrupt, he can wait until the absence of witnesses, the destruction of evidence, and the mutations of time, have deprived the creditor of the means of efficient opposition. And it would seem that the reason for the limitation applies with equal force to all classes of bankrupts. These considerations go far to sanction the construction given by Judge Hall, but for the purposes of this motion it is unnecessary to adopt that construction.

It is quite apparent that a bankrupt whose estate has assets, and whose creditors have interposed to protect their rights, should not be permitted to obtain his discharge, until he has been subject to the orders and supervision of the court sufficiently long to enable the assignee to avail himself of all the advantages which those orders afford for obtaining information and assistance from the bankrupt, which in many cases are essential to the satisfactory administration of the estate. It was this view probably that influenced the framers of the law to provide that in such cases no application shall be made for the discharge until the expiration of six months from the time of the adjudication of bankruptcy. The section under consideration provides that such application may be made after sixty days, where either debts have not been proved, or assets have not come to the hands of the assignee. Inasmuch as assets did not accrue to the assignee in this proceeding, the bankrupt might have applied for his discharge at any time after sixty days from his adjudication

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and within one year. As held *In re Woolums*, 1 N. B. R., 496, it is only when both debts have been proved, and assets have come to the assignee, that the discharge cannot be applied for until after the expiration of six months. Within the construction adopted by the Circuit Court, *In re Greenfield*, as he could have applied prior to the expiration of six months, he was required to apply within one year from his adjudication. Not having applied within the year, he has not availed himself of the condition which I have heretofore held is not permissive only, but imperative, if he desires to apply at all.

The objections of the opposing creditors are, therefore, well taken, and the discharge must be *denied*. An order to that effect is accordingly directed.

Mr. J. H. Martindale, for bankrupt.

Mr. Charles F. Durston, for creditors.

SUPREME COURT, CALIFORNIA.

Plaintiff consigned to defendant goods to be sold on commission, with instructions to retain all the proceeds over and above a certain price as his commissions.

The defendant sold the goods but failed to pay the proceeds to the plaintiff, who brings this action to recover the amount. Prior to the commencement of this action the plaintiff filed a petition in bankruptcy against the defendant, who was duly adjudged a bankrupt.

Held, that the debt was one arising out of transactions of a fiduciary character between the plaintiff and defendant, and would not therefore be discharged by the discharge of the bankrupt.

LEONARD L. TREADWELL and GEORGE R. CARTER v. WILLIAM HOLLOWAY, GREN HANNA and JAMES HANNA.

APPEAL from the District Court of the Third Judicial District, county of Santa Clara.

The plaintiffs, doing business at San Francisco, consigned to the defendants, at Gilroy, certain agricultural implements, to be sold for a sum not less than five thousand one hundred

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and fifty-four dollars and forty-six cents, which was to be transmitted to the plaintiffs—the defendants to retain, as commissions, any sum realized over and above that amount.

The defendants sold the goods, and, failing to pay over the money, this action was brought to recover the amount, less five hundred and fifty-seven dollars and eighty cents. At the trial it was agreed that prior to the commencement of the action the plaintiffs had filed a petition against the defendants as bankrupts, in the District Court of the United States, and that they had received a dividend of eleven per cent. on their claim, which exhausted the estate; that the defendants had been adjudicated bankrupts more than a year prior to the trial, and had received no discharge, and that the amount sued for is correct, reserving the question of interest and the effect of the proceedings in bankruptcy.

Judgment was rendered for the defendants, and the plaintiffs appealed.

William Matthews, for appellants.

The debt “was created by fraud,” “had its root and origin in fraud,” and therefore the bankrupt’s discharge was no bar to the action. (Bankrupt Act, 1867, Section 33; Bump on Bankruptcy, 456; *In re Kimball*, 2 N. B. R., 204; *Lemcke v. Booth*, 5 N. B. R., 351; s. c. 47 Mo., 385; *In re Patterson*, 2 Benedict, 155; s. c., 1 N. B. R., 307.)

Doyle & Barber, for respondents.

The decisions on this question are by no means uniform, and, as the Supreme Court of the United States has not yet decided the point, it can hardly be said to be settled by any absolute authority.

An able opinion, in the case of *Cronan v. Cutting*, 4 N. B. R., 667; s. c. 104 Mass., 245, holds that such a case is not within the meaning of the terms “acting in any fiduciary character,” in the 33d Section of the Bankrupt Act. It is difficult to see why the language of the Bankrupt Law of 1841, Section 9, “while acting in any other fiduciary capacity,” is not quite as sweeping and comprehensive as that just cited. Yet it was held, under that act, that a debt due for the pro-

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ceeds of consigned goods was barred by the bankrupt's discharge. (Hayman v. Pond, 48 Mass., 328; Chapman v. Forsyth, 2 How., U. S., 202; Commonwealth v. Stearns, 43 Mass., 343; Duguid v. Edwards, 32 How. P. R., 255.)

BY THE COURT.—The question made by counsel as to whether, upon the facts appearing, the debt from the defendants to the plaintiffs "was created by fraud" need not be considered. Whether originating in fraud or not, it is clear that it resulted from transactions of a fiduciary character. The 33d Section of the Bankrupt Act provides that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under its provisions.

Judgment reversed and cause remanded, with directions to render judgment for the plaintiffs according to the stipulation.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

S. filed a voluntary petition in bankruptcy on the 10th day of November, 1873, and was duly adjudged a bankrupt.

A creditor proved as a debt against the estate a judgment recovered in a State court March 1, 1873, which was based on a prior judgment, recovered in the same court July 26, 1862. No other debt was proved, and, on the application of the bankrupt for his discharge, the creditor appeared and opposed the granting of the same, on the ground that his consent had not been filed, and that no payment of thirty per cent., or any other sum, had been made to him by the bankrupt.

Held, that the 9th Section of the Bankrupt Act, as amended June 22, 1874, did not apply to the present case, as the petition was filed before the passage of the said act.

That, although the judgment proved as the debt in this case was recovered in 1873, yet the contract on which the judgment of 1862 was based, and which contract was, therefore, the basis of the judgment of 1873, was made prior to the judgment of 1862, and it is not proper to hold that the debt was contracted on the 1st of March, 1873; and, for the reason that the debt was contracted prior to January 1, 1869, no percentage in assets and no assent of creditors are required as a condition for granting the discharge.

In re Francke, 10 N. B. R., 438, cited and affirmed.

In re GEORGE H. SHELDON.

BLATCHFORD, J.—George H. Sheldon filed a voluntary pe-

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tition in bankruptcy in this court on the 10th of November, 1873, and was adjudicated a bankrupt. Subsequently, Walter W. Seymour proved as a debt against the estate of the bankrupt a judgment recovered in the Supreme Court of New York, March 1, 1873, by him against the bankrupt for one thousand five hundred and forty-three dollars and seventeen cents. That judgment was recovered on a prior judgment, recovered in the same court against the bankrupt July 26, 1862, for eight hundred and sixty dollars and eighty cents. No other debt has been proved by any other person. The bankrupt has applied for a discharge. Seymour appeared before the Register to oppose the discharge, and objected to the Register's entertaining any proceedings on the application for discharge, or making any report thereon otherwise than to dismiss the same, on the ground that the bankrupt had not filed the consent of Seymour to the discharge, and that no payment, either of thirty per cent. or otherwise, had been made to Seymour. The judgment of 1862 was recovered upon a promissory note, indorsed by the bankrupt for the accommodation of one A. H. Sheldon.

The 33d Section of the Bankruptcy Act of March 2, 1867 (14 U. S. Stat. at Large, 533), provided that "in all proceedings in bankruptcy, commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty *per centum* of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors, who have proved their claims, is filed in the case at or before the time of application for discharge." By the 1st Section of the Act of July 27, 1868 (15 *Id.*, 227), that provision was amended so as to read that "in all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty *per centum* of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have

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become liable as the principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge." By the 1st Section of the Act of July 14, 1870 (16 *Id.*, 276), it was declared that such provision of the Act of 1867, as amended by the Act of 1868, "shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first day of January, eighteen hundred and sixty-nine." Section 5112 of the Revised Statutes of the United States, passed June 22, 1874, enacts in these words the provision of the Act of 1868, as amended by the Act of 1870: "In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty *per cent.* of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors, to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first day of January, eighteen hundred and sixty-nine." The 9th Section of the Act of June 22, 1874 (18 U. S. Stat. at Large, 180), provides as follows: "That in cases of compulsory or involuntary bankruptcy, the provisions of said act [the Act of March 2, 1867] and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner, and with the same effect, as if he had paid such *per centum* of his debts, or as if the required proportion of his creditors had assented thereto. And, in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty

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per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value; and the provision in Section 33 of said Act of March 2d, eighteen hundred and sixty-seven, requiring fifty *per centum* of such assets, is hereby repealed." Section 21 of the Act of June 22, 1874, repealed all acts and parts of acts inconsistent with its provisions.

It is contended, for the creditor, that the provisions of the 9th Section of the Act of 1874 require that no discharge shall be granted to this bankrupt, who is a voluntary bankrupt, unless his assets are shown to be equal to thirty per cent. of the debt of such creditor (such debt being alleged by him to be one upon which the bankrupt is liable as principal debtor), or unless he procure the assent of such creditor to the discharge.

It is contended, for the bankrupt, that this debt was a debt contracted prior to the first day of January, 1869; that the provision of the 9th Section of the Act of 1874 in regard to discharges in cases of voluntary bankruptcy does not apply to debts contracted prior to the first day of January, 1869; and that the declaration in the 1st Section of the Act of 1870, and in Section 5112 of the Revised Statutes, that the requirements then in force in regard to the conditions of amount of assets, or of assent of creditors, on which alone a discharge could be granted to any bankrupt, whether voluntary or involuntary, shall not apply to debts contracted prior to January 1, 1869, is still to be applied as a qualification to the provision of the 9th Section of the Act of 1874, in regard to the discharges in cases of voluntary bankruptcy.

I still adhere to the opinion expressed by me in the case of *In re Francke* (10 N. B. R., 438), that the provisions of the 9th Section of the Act of 1874, in respect to discharges, both in cases of involuntary bankruptcy and in cases of voluntary bankruptcy, apply only to cases to be commenced after the passage of that act. My views ex-

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pressed in that case have not been overruled by superior authority, and I believe them to be sound on principle.

Under such views, as the petition in the present case was filed before the passage of the Act of 1874, the 9th Section of the Act of 1874 would not apply to the present case, and it would be left to be governed by the provisions of Section 5112 of the Revised Statutes, under which this bankrupt would not be required to show any percentage in assets or any assent of creditors, because the debt of Seymour, the only debt proved, was contracted before January 1, 1869. Although the judgment proved as the debt in this case was recovered in 1873, yet the contract on which the judgment of 1867 was based, and which contract was, therefore, the basis of the judgment of 1873, was made prior to the judgment of 1862. In one sense, the contract of indorsement made by the bankrupt on the promissory note sued on in the judgment of 1862 was merged in that judgment, but, for the purposes of the provision as to debts contracted prior to January 1, 1869, it would be subversive of the intent and meaning of such provision to hold that the debt in this case was contracted on the 1st of March, 1873, and that the entry of the judgment was the contracting of the debt, and that the judgment was the contract, and that the indorsement of the note was not the contract.

But, even though the 9th Section of the Act of 1874 should be held to be applicable to the present case, the bankrupt would, I think, be entitled to a discharge without showing any percentage in assets, or any assent of the creditor Seymour, for the reason that the debt of Seymour, having been contracted prior to the 1st of January, 1869, no percentage in assets and no assent of the creditor is required.

Neither the 1st Section of the Act of 1870, nor that section as re-enacted in the last clause of Section 5112 of the Revised Statutes, is directly or by implication repealed by the Act of 1874. Nothing in said Section 5112, or in the previous legislation before recited, is repealed, except the provision "requiring fifty per centum of such assets," and what is

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inconsistent with the provisions of the Act of 1874. All that Section 9 of the Act of 1874 purports to do in regard to discharges in voluntary cases, as a change of the previous law, as embodied in said Section 5112, is to require that the amount of assets shall be thirty per cent. instead of fifty per cent., and that the assent of creditors, when necessary, shall be the assent of one-fourth in number and one-third in value, instead of the assent of a majority in number and value. There is nothing inconsistent with the provisions of section 9 of the Act of 1874, in regarding the provisions of that section respecting a percentage in assets and an assent of creditors as not being applicable to debts contracted prior to the 1st of January, 1869. The Act of 1874 does not in its 9th Section, or in its 21st Section, or in any other section, directly repeal any provision of said Section 5112, or of any prior enactment embodied therein, except the provision "requiring fifty per centum of such assets." The effect of such repeal was, in my judgment, merely to substitute thirty per cent. for fifty per cent. as the percentage in cases where a percentage in assets was required before, and would still continue to be required—that is, in voluntary cases, and in respect of debts in such cases contracted after December 31, 1868. At the time the 9th Section of the Act of 1874 was enacted, a voluntary bankrupt had a right to a discharge in respect of debts contracted prior to January 1, 1869, without showing any percentage in assets or obtaining any assent of creditors. The said 9th Section not only does not take away such right, but impliedly preserves it by repealing nothing except the requirement as to fifty per cent. in assets, in cases where a percentage in assets was before necessary and still continues to be necessary, namely, in voluntary cases, and in respect to debts in such cases contracted after December 31, 1868, and by substituting for such repealed requirement a requirement of only thirty per cent. in assets. The structure of the 9th Section of the Act of 1874 is peculiar; and to ascertain its meaning it must be looked at as a whole. The first sentence in it relates to compulsory or involuntary bank-

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ruptcy alone, and purports to legislate in regard to such provisions of former acts respecting discharges in involuntary cases as required a percentage in assets or an assent of creditors, and to legislate in regard to such provisions alone. It says that such provisions "shall not apply ;" and supplements that declaration by the synonymous one that the involuntary bankrupt, if otherwise entitled to a discharge, may be discharged in the same manner, and with the same effect, as if he had paid the required per centum of his debts, or as if the required proportion of his creditors had assented thereto. The provisions in regard to percentage in assets and assent of creditors, in involuntary cases, thus being abrogated in regard to all debts, whenever contracted, of course were abrogated in regard to debts contracted prior to January 1, 1869. The second sentence in the said 9th Section relates to voluntary bankruptcy alone; and, as the first sentence purports to legislate only in regard to the requirement in involuntary cases of a percentage in assets or an assent of creditors, so the second sentence ought to be regarded as legislating only in regard to such provisions of former acts respecting discharges in voluntary cases as required a percentage in assets or an assent of creditors. The substance of such second sentence is to declare, *in pari materia* with the previous declaration, that in involuntary cases the requirement as to any percentage in assets, or any assent of creditors, is abrogated; that in voluntary cases such requirement shall not be wholly abrogated, but shall be changed from a percentage of fifty per cent. in assets to one of thirty per cent. in assets, and from an assent of a majority in number and value of creditors to an assent of one-fourth in number of creditors and one-third in value. This leaves unaffected the provision that the requirement as to percentage in assets and assent of creditors, where applicable, shall not apply to debts contracted prior to January 1, 1869. The enactments in the said 9th Section are properly to be regarded as amendments of Section 5112 of the Revised Statutes in the particulars of the rate of percentage in assets and the

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number and value of creditors required to assent, and in those particulars alone. The changes made in those particulars are not inconsistent with the former provision that any requirement as to percentage in assets, or as to assent of creditors, shall not apply to debts contracted prior to January 1, 1869.

From these considerations it results that the bankrupt is entitled to his discharge without showing any percentage in assets, or any assent of the creditor who has proved his debt.

The clerk will certify this decision to the Register.

H. E. Tremain, for the creditor.

J. A. Welch, for the bankrupt.



SUPREME JUDICIAL COURT, MASSACHUSETTS.

Where the defendant, after receiving his discharge in bankruptcy, filed a bond to dissolve an attachment existing upon the property of the defendant for a period of more than four months prior to the commencement of bankruptcy proceedings:

Held, that the bond was filed too late, and that the plaintiff is entitled to have the special judgment entered.

EZEKIEL S. JOHNSON v. PATRICK COLLINS.

GRAY, C. J. ; WELLS, MORTON, COLT, DEVENS, J. J.—This is an action of contract for damages for breach of covenant against incumbrances. The pleadings may be referred to. The writ is dated November 4, 1870. On the same day defendant's real estate was attached, and the action entered at the January Term, 1871. September 2, 1872, defendant went into bankruptcy. His bankruptcy was suggested in the case October 11, 1872. May 5th, 1873, defendant obtained his discharge in bankruptcy, which said discharge was pleaded and set up in the case May 27, 1873, and the certificate thereof filed.

At the April Term of this court, 1874, the case was tried to obtain a special judgment on property attached on the

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writ, at which trial the defendant set up his discharge in bankruptcy, and a verdict of nine hundred and ninety-five dollars and twelve cents rendered, with the order that judgment, when entered, should be against the property attached. At the trial of the cause, the defendant alleged exceptions, which were allowed, and the case removed to the Supreme Judicial Court for argument. On the 18th day of November, 1874, the defendant filed a bond dissolving the attachment on said writ, in accordance with the provisions of the statutes. December 9, 1874, a rescript was received from the Supreme Judicial Court, ordering the exceptions to be overruled. On the 10th day of December, 1874, before final judgment had been entered in said cause, the defendant filed this motion, upon which the case is to be determined.

Thomas Weston, Jr., attorney for defendant.

B. E. Perry & S. W. Creech, Jr., attorneys for plaintiff.

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And now comes the defendant, and says that on the 18th day of November, A. D. 1874, he filed in the clerk's office of this court, with the papers in this case, a bond in accordance with the provisions of the Statute, dissolving the attachment made on the plaintiff's writ, as appears by the docket and files. He further says that his discharge in bankruptcy, which was granted May 5, 1873, was pleaded and set up at the trial of said cause, a copy of which appears on the files. He therefore moves that the qualified judgment to be entered be not entered, and that judgment may be entered for the defendant in this cause by his attorney, Thomas Weston, Jr.

JOSEPH WILLARD,
Clerk.

Commonwealth of Massa- }
chusetts, Suffolk. } ss.

SUPERIOR COURT.

And now, upon the aforesaid agreed facts, said motion for

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judgment is allowed, and judgment ordered for the defendant in accordance therewith. Plaintiff appeals to the Supreme Judicial Court for the Commonwealth.

JOSEPH WILLARD,
Clerk.

PLAINTIFF'S BRIEF.

The defendant filed a petition in the District Court of the United States on the 2d day of September, 1872, and was on the 6th day of September, 1872, declared a bankrupt. On the 4th of November, 1870, more than four months prior to the commencement of the proceedings in bankruptcy, the attachment was made, and was subsisting as an attachment at the time the defendant applied for the benefit of the act. This attachment constituted, by force of the laws of the United States, a lien upon the property attached, which lien the defendant could not divest or destroy by any act of his own, except by payment. After the decree of bankruptcy, the bankrupt could not avail himself of the laws of the State which provide for dissolving attachments, and thereby defeat the lien created by the laws of the United States which was subsisting at the time the decree of bankruptcy was passed. After this decree of bankruptcy was passed, the bankrupt could not by any act of his own change the status or rights of his creditors.

In *Carpenter v. Turrell* (100 Mass., 450) the attachment was made July 30, 1867, and was dissolved by bond August 31, 1867. February 27, 1868, the petition was filed in bankruptcy, and followed by a decree. At the time of this decree the lien by attachment had ceased. The fact that a bond to dissolve the attachment was given is immaterial, even if the property attached cannot be found, which is not admitted. This fact cannot deprive the plaintiff of his right to have a judgment to be levied thereon.

McNutt v. Bland (2 Howard's Sup. Ct. Rep., 9). This case is to some extent an authority for the position submitted. It is an authority to show that after a decree of

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bankruptcy the status of the bankrupt and his creditors and their rights are to be determined by the laws and courts of the United States.

B. E. Perry & Samuel W. Creech, Jr., attorneys for plaintiff.

DEFENDANT'S BRIEF.

The plaintiff's attachment was dissolved by the bond filed pursuant to Chap. 123, Sections 104 and 105, Gen. Stats.

The special judgment was to be entered only against the property attached.

The discharge in bankruptcy prevented any judgment in favor of the plaintiff, and the bond dissolved the attachment made on the defendant's property. It follows, therefore, that judgment in this case can only be entered for the defendant. *Carpenter et al. v. Turrill et al.* (100 Mass., 450).

Thomas Weston, Jr., attorney for defendant.

WELLS, J.—The bond to dissolve the attachment which may be given at any time "before final judgment," is upon condition to pay whatever judgment the plaintiff may recover in the suit then pending. The judgment thus secured must be a judgment against the defendant personally. *Carpenter v. Turrill* (100 Mass., 450), *Braby v. Boomer* (Bristol County, Oct., 1874). At the time this bond was given, no suit was pending in which any such judgment could be rendered. The cause had been tried. The discharge in bankruptcy was set up by a proper plea. The result was an adjudication that the plaintiff was not entitled to recover against the defendant personally. The court then proceeded to make a special adjudication to give effect to the lien of the creditor against the specific property attached on the writ. That was a final disposition of the case as a suit against the debtor himself. There was no longer the possibility of a judgment to which the condition of the bond would be applicable. A bond whose condition depends upon a contingency which can in no event arise, is a mere nullity. We are of opinion that a statute which provides for a bond to

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secure the judgment that may be recovered in an action at law, and which allows the bond to be given at any time before final judgment, must be construed to contemplate a bond given while the suit is in a stage which will admit of its prosecution to such final judgment.

The bond in this case was not authorized by the General Statutes, and did not warrant the refusal of the court below to enter the special judgment to which the plaintiff had been held to be entitled.

Judgment reversed.

UNITED STATES CIRCUIT COURT—E. D. PENNSYLVANIA.

The defendants, brokers, purchased from another broker certain shares of stock, the transfer and payment to be made on the next day.

On the next day the vendor sent to the vendees a bill of sale of the stock, and notified them thereby that the stock had been or was about to be transferred. Payment was thereupon made by the vendees.

The vendor failed later in the day, without having made the transfer, but within a few hours after his failure, upon importunity of the vendees, who had knowledge of his insolvency, he gave to them a certificate of a certain number of the shares agreed to be sold, with power of attorney to make the transfer, and procured a debtor of his to make the transfer of the remainder, which was done within a few days subsequently.

The assignees in bankruptcy of the vendor, by a bill in equity, sought to restrain the vendees from transferring or selling the said shares of stock, and to enforce a delivery thereof to the assignees, alleging that the receipt thereof was a preference, and in violation and fraud of the Bankrupt Act. The court dismissed the bill.

IN EQUITY.

JOHN SPARHAWK, GEORGE J. GROSS, and J. DAVIS DUFFIELD, Assignees in bankruptcy of Charles T. Yerkes, Jr., late trading as C. T. Yerkes, Jr. & Co., Plaintiffs, v. SAMUEL A. RICHARDS and WILLIAM E. THOMPSON, trading as Richards & Thompson, Defendants.

MASTER'S REPORT.

To the Honorable the Judges of the said Court:—

The master appointed in the above entitled suit in equity, respectfully reports—

That after due notice, I was attended at my office, No.

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131 South Fifth street, Philadelphia, on the 18th day of March, 1874, at one o'clock, P. M., and at other times, by *George Junkin, Esq.*, for the plaintiffs, and *Samuel G. Thompson, Esq.*, for the defendants, by whom arguments were made as to the questions involved in said suit.

The following is a statement of the material facts:—

On the 14th day of October, 1871, the defendants, being brokers in the city of Philadelphia, purchased from Charles T. Yerkes, Jr., trading as C. T. Yerkes, Jr. & Co., (also brokers,) of whom the plaintiffs are assignees in bankruptcy, sixty-seven shares of the stock of the Pennsylvania Railroad Company, for the sum of three thousand eight hundred and ten dollars and sixty-three cents. The purchase was what is known among brokers as "regular," the transfer of the stock and the payment therefor to be made on the day succeeding the day upon which the contract is made. The 14th day of October, 1871, was Saturday; consequently the execution of this contract was to be completed on Monday, the 16th day of October, following. About noon on that day the defendants gave to C. T. Yerkes, Jr. & Co. their check on the First National Bank of Philadelphia for the amount of the purchase, upon receiving from said C. T. Yerkes, Jr. & Co. a bill for said stock, in the following form:—

"Office of C. T. Yerkes, Jr. & Co.

"20 South Third Street,

"Philadelphia, 16, 1871.

"Sold R. & Thompson,

"———67 Pa———@ 56 $\frac{1}{2}$ ———\$3810.63.

"Transfer'd.

C. T. Yerkes, Jr. & Co.,

"Per J. P. Y."

The check was duly paid. Shortly afterwards, on the same day, sometime during the afternoon, Mr. Richards, one of the defendants, went to the office of C. T. Yerkes, Jr. & Co., and inquired whether the stock had been transferred. He was informed that it had not been transferred. What induced the visit of Mr. Richards he does not clearly state,

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but it is evident that his suspicions had been aroused as to the financial condition of C. T. Yerkes, Jr. & Co., from information he had received at the Board of Brokers. He then inquired whether C. T. Yerkes, Jr. & Co. had the stock, and was informed that they had not the amount which had been purchased by his firm, but that they had thirty-three shares. For this he demanded the certificate, with a power of attorney to transfer, which was given to him. Subsequently, a few days afterwards, by an arrangement previously made between the firm of Bowen & Fox, who were, on the 16th day of October, indebted to C. T. Yerkes, Jr. & Co., the remaining shares of the sixty-seven were transferred to Richards & Thompson. This arrangement appears to have been made by Mr. Fox, of the firm of Bowen & Fox, with Charles T. Yerkes, Jr., Mr. Fox, hearing of his trouble with Richards & Thompson, volunteering to make the delivery of the stock for him. Bowen & Fox accordingly credited themselves with the amount thus delivered on behalf of C. T. Yerkes, Jr. & Co., in their account subsequently rendered.

C. T. Yerkes, Jr. & Co. failed on the said 16th day of October, 1871, between two and three o'clock in the afternoon, and did not afterwards resume payment. Proceedings in bankruptcy were commenced against them, and, on the 13th day of December following, adjudication of bankruptcy was made, and subsequently the plaintiffs were appointed assignees. The present bill was brought by them to restrain the defendants from transferring or selling the said shares of stock, and to enforce the delivery of the same to the plaintiffs, or, if they have been sold, to obtain an account thereof, the plaintiffs alleging that the receiving and procuring of the said shares of stock by the defendants, under the circumstances narrated, was a procurement of a preference to themselves over the other creditors of the bankrupt, and in direct violation and in fraud of the provisions of the Act of Congress entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

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The theory of the plaintiffs' bill is, that when the defendants paid the sum stated to C. T. Yerkes, Jr. & Co. upon the faith of the representation that the stock had been transferred, or was about to be then presently transferred to them, they gave a credit to C. T. Yerkes, Jr. & Co., and, upon the failure by the latter to make the transfer, they became merely creditors for the amount which they had paid, and that being such, and having reasonable cause to believe that C. T. Yerkes, Jr. & Co. had become insolvent, their demand for the transfer and subsequent receipt of the stock was a procurement of a preference, as contemplated in the first clause of the 35th Section of the Bankrupt Act—in other words, that the failure of C. T. Yerkes, Jr. & Co. to make the transfer immediately after the payment, was a failure to execute a contract with the defendants, and that before its execution the insolvency of C. T. Yerkes, Jr. & Co. intervened, the existence of which the defendants had reasonable cause to believe, and that, therefore, the insolvent had no right, under the provisions of the act referred to, to fulfill the contract, either directly or indirectly, and the defendants must account for and return that which they received.

It is answered on the part of the defendants that the bill received by them from C. T. Yerkes, Jr. & Co., and their payment of the consideration of the purchase, effected an equitable assignment of the stock, and that, although the actual transfer on the books of the railroad company had not then been made, yet the property became vested in the defendants, and that, consequently, the subsequent transfer could not be one obnoxious to the provisions of the Act of Congress referred to. This position is not destitute of authority to support it, at least as to the thirty-three shares, (see Addison on Contracts, 204, and the cases there cited,) but I prefer to consider the transaction from another point of view.

The contract for the purchase and sale on the 14th of October, was that on the payment of the money on the 16th, C. T. Yerkes, Jr. & Co. would transfer to the defend-

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ants the stock so purchased and sold. No credit was intended to be given by either party to the other. The act of the vendor—the transfer—and the act of the vendee—the payment—were to be synchronous. If the vendor did not transfer the stock, the vendee was not bound to make the payment; and if the vendee did not make the payment, the vendor was not bound to make the transfer. The defendants, therefore, awaited the signification by their vendor of his readiness to do his part, and when the bill referred to was received, it was, according to the custom of brokers, a notification by the vendor that he was then presently ready to make the transfer and would immediately do so. Thereupon the defendants made the payment. The vendor then discovered that he had not a sufficient quantity of this particular stock then in his possession to enable him to fulfill this and other contracts which he had made. His duty was clearly, then, to immediately return the money paid, and if he had done so I do not think it could be contended that his assignees in bankruptcy could recover it from his vendee. If the vendor had said to the vendees "I cannot do that which I have just told you I was ready to do, and I therefore return that which was given to me upon the faith of my promise of immediate performance of my part of the contract," could it be pretended that the vendees, by its acceptance and rescission of the contract, would receive a preference, though they should be informed at the same time of the insolvency of their vendor? It seems to me that to hold that the clause of the section of the act referred to contemplates such a result and such an application of its provisions, would be a monstrous distortion of the language and intention of Congress.

The vendor, however, did not make the tender of return suggested, but, on the same day, gave the defendants a certificate with power of attorney to make the transfer of thirty-three of the shares purchased, and within a few days transferred the remaining shares by availing himself of the offer of a debtor of his to make it for him, crediting the value of the stock on the debt.

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Now, was the course of the vendor any more a violation of the provisions of the Bankrupt Act than the one just supposed? Are the interests of the creditors of the bankrupt any more injuriously affected in the one case than in the other? Can it be that the defendants, who would not have parted with their money unless they had believed that they would immediately receive the stock, and who would have been entitled to receive an immediate return of their money, though their vendor had become insolvent, can be required to give up the stock after the vendor has actually transferred it to them—part of it on the day when he should have done so by the terms of his contract, and the remainder within a day or two subsequently? I think that the clause of the section referred to cannot be construed to apply to transactions with an insolvent, or one about to become so, where, by the terms of the contract, a present adequate consideration is intended to be paid for a present delivery or transfer of property, although the necessities of the ordinary convenient conduct of business may require a trust to be reposed by both parties in each other, and either fails, before his unexpected insolvency occurs, (the knowledge of which is communicated to the other,) to perform his part, but does so shortly afterwards; provided; of course, that the rights of *bona fide* purchasers for value be not affected. For how can a transfer or payment, under such circumstances, be said to be made with a view to give a preference? Where a credit is intended to be given, though but for a day or an hour, or even a shorter time, if such may be the case, as where that which is to be done is, by a proper construction of the contract, to be performed subsequent to and not simultaneous with the payment of the consideration, then an intention to give a preference, within the meaning of the statute, may be attributed to a performance, after the intervention of insolvency, of one such contract, and not of others of the same nature.

Before commencement of proceedings in bankruptcy, but after insolvency, the insolvent may sell his property for a present adequate consideration, because his estate receives

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value and no diminution thereof takes place (*Cook v. Tullis*, 9 N. B. R., 433).

Can the circumstance that insolvency happens between the payment of the consideration and the delivery of the property, render the transaction less innocent, or one to which creditors can object as an injury to their interests?

It is to be observed that I have taken as proved that the defendants, at the time they received the stock, had reasonable cause to believe that C. T. Yerkes, Jr. & Co. were insolvent. The only one of them examined has denied that such was the case, but such denial is evidently to be attributed to his misunderstanding of what, in contemplation of law, is meant by insolvency.

To further illustrate the view which I have taken, it has occurred to me that the transaction cannot be distinguished from the purchase of coupon bonds payable to bearer, over the counter of a broker, where, after the money has been handed, and in the instant intervening between its receipt and delivery of the bonds, in consequence of unexpected demands, he becomes insolvent, and the fact is made known to the purchaser. Surely the broker would not be giving a preference to a creditor or person having a claim against him by then delivering the bonds.

I have not been able to find any case in point sustaining the conclusion to which I have arrived; but the doctrine that advances made on the faith of a security presently to be given will be protected,—notwithstanding changes in the condition of the borrower pending the consummation of the agreement, by actual delivery of the security,—is analogous in principle to the reasoning which I have adopted. See *ex parte Ames*, 7 N. B. R., 230; *Perrin & Harce, Id.*, 283.

I have not considered the applicability of the second clause of the 35th Section of the Bankrupt Act, because, apart from the question of alleged preference, there is not the slightest evidence that the sale was made out of the ordinary course of the business of the debtor, or with a view to prevent his property from coming into the hands of the

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assignees, or to defeat or delay the object of the act or impair its operation.

I recommend that the bill be dismissed.

J. MASON,
Master.

EXCEPTIONS TO MASTER'S REPORT.

First. Because the master has reported that there was no preference obtained by the defendants in fraud of the Bankrupt Law.

Second. Because the master has reported that the defendants should not be required to account for the stock transferred to them by the bankrupt after both he and they were fully aware of his insolvency.

Third. Because the master has reported that the bill should be dismissed.

GEORGE JUNKIN,
Solicitor for Plaintiffs.

McKENNAN, C. J.—Upon the above exceptions by the plaintiffs to the Master's Report, the court confirmed the report and dismissed the bill.

UNITED STATES CIRCUIT COURT—IOWA.

An assignment by a debtor of all his property for the benefit of all his creditors, under the provisions of the laws of Iowa, is an act of bankruptcy, and though not absolutely void *ab initio*, is subject to be avoided by proceedings taken under the Bankrupt Act.

Where the assignee, appointed under such assignment, took charge of the debtor's property and sold it and in all respects acted in perfect good faith, he is not to be held personally liable to the assignee in bankruptcy of the same debtor, for the value of the property assigned to him, or its proceeds.

ALONZO CRAGIN, Assignee of S. & B. Stern, v. JOHN THOMPSON.

THIS is a writ of error to the District Court for the district of Iowa. The plaintiff is the assignee in bankruptcy of the late

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firm of S. & B. Stern, and the defendant was the assignee in a deed of voluntary assignment made by the said firm before they were proceeded against in bankruptcy. The present action is in the nature of trover for the value of the property assigned to the defendant. In answer, the defendant denied all liability, and set up as a special defense that before the adjudication of bankruptcy the Messrs. Stern made a general assignment of all their property to the defendant for the benefit of all their creditors, under the provisions of the laws of Iowa; that the defendant accepted the trust in good faith, gave bond, and qualified and became an officer of the District Court of the State for the county of Dubuque, and subject to its orders, and that before this action was brought, the defendant, by the order of said court, had fully administered all of said property and distributed the proceeds among the creditors of the said S. & B. Stern.

A jury was waived and the cause tried to the court. The court below made a special finding of facts and gave judgment for the defendant. The facts specially found are sufficiently referred to in the opinion of the court. To reverse this judgment, the assignee in bankruptcy brings the case here by writ of error.

Shiras, Van Duzee & Henderson, for the plaintiff in error.

Griffith & Knight, for the defendant in error.

DILLON, J.—As this case comes here on a writ of error, only questions of law can be reviewed. The sole question of law presented by the record is, whether, assuming the truth of the facts specially found by the District Court, the defendant is personally liable to the assignee in bankruptcy for the value of the property he received from the Messrs. Stern. The material facts are these: The assignment to the defendant under the statute of Iowa, and the defendant's qualification as such assignee by filing in the State court the requisite bond, and his possession of the assigned property under the deed of assignment, all preceded the initiation of proceedings against the assignors under the Bankrupt Act. After

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the adjudication the assignee in bankruptcy demanded of the defendant the property, which he refused to surrender. To compel such surrender summary proceedings were instituted in the Federal District Court, but were subsequently dismissed in order that the present action might be brought, which was commenced therein February 24, 1872. Meanwhile, however, acting under the orders of the State District Court, the defendant had sold the property assigned to him, and had distributed the proceeds under the orders of that court. This was before the present action was brought. The fact is expressly found that the defendant acted in good faith, that he had no interest in the assignment and derived no benefit from it, and that he pursued the State law and paid over the proceeds of all property which came to his hands under the orders of the State court to the creditors who proved their debts under the assignment. Under these circumstances the question for decision is, whether the defendant is personally liable to the assignee in bankruptcy for the value of the property assigned to him or its proceeds.

It has been decided in this circuit that a voluntary assignment by a debtor, under State laws, though free from fraud in fact, and embracing all of his property, and made for the benefit of all of his creditors, is an act of bankruptcy within the meaning of the Bankrupt Law. (*In re Burt*, 1 Dillon, C. C., 439; *Hobson v. Markson*, *Ib.*, 421.) The assignee in bankruptcy is entitled, as against the assignee under the State law, to the possession and control of the estate.

So far there can be no doubt.

I am of opinion that while such an assignment is an act of bankruptcy, the assignment itself is not absolutely void *ab initio*, but only subject to be avoided by proceedings taken under the Bankrupt Act. If the assignors are adjudicated bankrupts, the property assigned passes to, and becomes vested in, the assignee in bankruptcy, and he is entitled to its possession, so that it may be used by him to pay the debts which shall be proved against the estate in the Bankruptcy Court.

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The proceedings under the State law, which contemplated that creditors shall *there* prove their debts and receive dividends, are inconsistent with the proceedings under the Bankrupt Act, which requires all assets to be administered, and all debts established in the Bankruptcy Court. There cannot be two concurrent administrations of the same estate, and of course the State enactment must give way in cases where it is brought into collision with the Bankrupt Act.

If the present action were against the creditors who received dividends under the assignment, there could, as it now seems to me, be little or no doubt as to their liability. But, is the defendant liable, since he had no property in his possession when this action was brought, and had, before that time, paid over in good faith all the proceeds of the assigned property under the orders of the State court? It is my judgment that the defendant should not, under these circumstances, be held personally liable. It is not necessary so to hold in order to prevent the Bankrupt Act from being evaded or its operation defeated. One plain remedy for the assignee in bankruptcy was to apply to the State court, which, down to the adjudication of bankruptcy, at all events, if not afterwards, was rightfully exercising its jurisdiction over the assigned estate, and ask for an order upon the assignee under the State law, to surrender the estate to him. If improperly denied, the assignee in bankruptcy would have a remedy by appeal to the Supreme Court of the State, whose final judgment, if against him, would be subject to revision by the Supreme Court of the United States. I do not say, nor in this case is it necessary to affirm, that this would be the only remedy of the assignee in bankruptcy. If the property whose value is sought in this case were still in the hands of the defendant, it may be that he would be liable in respect to it, if he should refuse to surrender it to the assignee in bankruptcy. This would depend upon the question whether, after the adjudication of bankruptcy and the appointment of an assignee (thus superseding the rightfulness in law of any further administration under the State

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Statute), the property assigned was in the custody of the law—*i. e.*, of the State court and its officer, the assignee under the State law.

I have strong doubts, notwithstanding the argument of the District Judge, whether property in the hands of an assignee under the State law is *in custodia legis*, after the adjudication of bankruptcy, so as to exempt such assignee from liability to the assignee in bankruptcy or from proceedings in the federal courts to protect the rights of creditors under the Bankrupt Act. If the State assignee should surrender the property, he ought to be protected in so doing by the State court; but, if it denied him such protection, he could take the case, if necessary, to the Supreme Court of the United States. On the other hand, if the mere making of a voluntary assignment under the State laws withdraws the property and the assignee wholly from the operation of the Bankrupt Act, and the machinery it has provided for the collection and distribution of assets, under the supervision of the court it has established for that purpose, the Bankrupt Act would, to this important extent, seem easy of evasion. But I do not need to pursue the subject further, or inquire what remedies the assignee in bankruptcy would have under other circumstances. What I hold is that, under the special findings of the District Court—which not only exonerated the defendant from bad faith, but affirmatively found that he acted in good faith, and under the orders of the State court, whose jurisdiction and right to act were in no way questioned therein by the assignee in bankruptcy—the defendant is not personally liable to the present plaintiff. He must now seek his remedy against those who have received payments from the defendant in contravention of the Bankrupt Act.

Affirmed.

In re Holmes and Lissberger.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

General Order No. 86 is entirely prospective, and does not apply to proceedings pending at the time of its adoption.

The examination of a debtor at a composition meeting must only be such as will properly be in furtherance of the purpose of arriving at a true exhibit of the debtor's affairs.

If any creditor objects, no vote can be taken on a proposition of compromise, until the examination of the debtor is completed.

If necessary, the composition meeting may be adjourned to a specified time, while the examination of the debtor is in progress.

The books of the debtor must be produced on the demand of any inquiring creditor.

When the books are produced, time may be allowed for experts to examine them.

The Register has the power to regulate the form and order of proceedings at a composition meeting, and to decide questions that arise, subject to review by the court.

The Register must decide who are entitled to vote, and in respect to what amount of debts, and pass upon the regularity in form of the proofs and letters of attorney.

The examination of the debtor ought to be reduced to writing, and sworn to and subscribed by him.

In re SAMUEL HOLMES and LAZARUS LISSBERGER.

F. H. Bangs, for the creditor.

W. G. Choate, for the debtors.

BLATCHFORD, J.—In this matter, the alleged bankrupts were copartners. One of them filed a petition in bankruptcy in this court, on behalf of himself and against his copartner, for the adjudication of both of them as bankrupts, in respect of their copartnership debts, and of the individual debts of each of them. There has been no adjudication of bankruptcy; but both of the copartners have united in an application under which proceedings for a composition are pending under the 17th Section of the Act of June 22d, 1874. A first meeting of creditors having been called by the court, to take place at the office of the clerk of the court, and the creditors having assembled, the deputy-clerk held and presided at the meeting. Its proceedings being in progress, and one of the alleged bankrupts being present at the meeting, and being under examination by a creditor, the creditor raised the point before the deputy-clerk, that under General Order No. 36, a

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Register should hold and preside at the meeting. The point is certified to the court for decision.

The 17th Section of the Act of 1874 provides that the creditors may, at a meeting called under the direction of the court, resolve to accept a composition. The section provides for notice to each known creditor, of the time, place, and purpose of the meeting, but it contains no provision as to who shall preside at the meeting, and no provision requiring a Register to preside at the meeting. It cannot be doubted that the meeting might lawfully be held in the presence of the judge, and be presided over by him. It has been the practice in this district, where there has been an adjudication, to direct that the meetings of creditors in respect to composition be held at the office of the Register to whom the case has been referred, and he has held and presided thereat. But, in cases where there has been no adjudication, it has been the practice, in this district, to direct that such meetings be held at the office of the clerk of the court, and either the clerk or the deputy-clerk has held and presided thereat. A reference of a case in bankruptcy to a Register does not take place, under General Order No. 4, until a voluntary petition is filed, on which there is a right to an immediate adjudication, or until on an involuntary petition there is an adjudication. The proceedings, which are, by General Order No. 4, required to be had before a Register, are proceedings which are to take place after an adjudication in involuntary bankruptcy, or after the filing of a voluntary petition whereon an adjudication can be immediately had. Therefore, in the present case, when the adjudication was contested by the copartner, who did not join in the petition, no case for a reference to a Register had arisen, and it was competent to the court to direct the meeting of creditors to be held and presided over by an officer other than a Register. It seemed meet that the clerk of the court should be designated. The deputy-clerk, a recognized statutory officer, duly appointed, acted in place of, and in the absence of, the clerk, with the assent of the meeting, down to the time this objec-

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tion was made. The question arises whether, under General Order No. 36, it is now incompetent to continue the meeting except with a Register as its presiding officer. The General Order is entirely prospective in its operation, and purports to refer only to proceedings for composition initiated after its adoption. These proceedings were initiated before, and the meeting was in progress, with the deputy-clerk presiding, when the General Order was promulgated. The meeting, though adjourning from time to time, is a unit. The General Order provides that "the Register acting in the case, or, if no Register has been assigned, a Register to be designated by the court, shall, at the time and place specified in the notice for holding such meeting, hold and preside at the same." No Register could now, at the time and place specified in the notice for holding this meeting, hold and preside at it, for such time has passed. If the General Order is to apply at all to this meeting, the meeting must be dissolved, and the proceedings which have taken place must go for naught, and a new meeting must be called. No such result could have been intended or contemplated by the General Order. In the absence of any general rules as to composition, the courts have administered the provisions in such a manner as seemed most proper, and in consonance with the existing statutes and General Orders. In future cases, the provisions of General Order No. 36 will be observed, but the present case will proceed as it has thus far gone on.

The question is also certified to the court as to what is comprehended under the language of the 17th Section of the Act of 1874, to the effect, that the debtor is, at the first meeting, to "answer any inquiries made of him," as to the extent to which creditors have a right to carry the examination of the debtor, at such first meeting, and as to whether, if an examination of the debtor is desired by any creditor, or is in progress, and other creditors desire to have a vote taken on a resolution for composition, and objection be made by any creditor to taking such vote before the examination of the debtor is completed, the presiding officer of the meeting

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ought to postpone the taking of such votes until after such examination is completed.

The statement which is required by the statute to be produced to the meeting by or on behalf of the debtor, and which statement is to show the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due, is a statement upon which the creditors are to act in determining, each for himself, whether he will vote in favor of a resolution accepting the proposed composition, and whether he will confirm it by his signature. The object in view in requiring the debtor to be present in person at the meeting, and to answer orally any inquiries made of him, is to enable any creditor who may be dissatisfied with the contents of such statement, or may regard it as inaccurate, in omitting things which it ought to contain, or in containing erroneous statements, to inquire of the debtor as to the particulars respecting which information is thought to be desirable. The composition proposed can be judged of only in reference to the condition of the debtor's affairs, in respect of debts and assets. The statement is supposed to contain a true exhibit of such affairs.

The question whether the proposed composition ought to be accepted by any creditor, can be determined by him only after he has before him a true exhibit of the debtor's affairs. The percentage offered in settlement can be determined to be the proper percentage only by comparing a true statement of the debts with a true statement of the assets. The examination of the debtor, if desired or entered upon by any creditor, is for the purpose of arriving at a true exhibit of the debtor's affairs. The inquiries to be made must, of course, be only such as will properly be in furtherance of such object, and such as will aid in determining whether any composition at all ought to be accepted, or the terms of the one which ought to be accepted. Such inquiries are important, too, not merely with reference to the vote and action of the creditor who makes them, but with reference to the vote and action of other creditors. Therefore, such inquiries ought to

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be made and completed, before any vote is taken, if any creditor desires the vote to be postponed until after the inquiries are completed. Creditors may go to the meeting with preconceived ideas, in favor of a particular composition, and the creditor who desires to make inquiries may be satisfied that on learning the true state of the debtor's affairs, such creditors will change their views. As he will be bound by the composition, if it shall be accepted and confirmed, and his name and address, and the amount of his debt are shown in the statement of the debtor, he has a right to require that all creditors, in voting and in confirming, shall do so with knowledge of, or with the opportunity to know the true condition of the debtor's affairs. Moreover, if the debtor has kept books in his business, such books, on the demand of any inquiring creditor, must be produced, and the debtor must answer all inquiries in reference to any entry in such books, which bears upon the question of the exact condition of the debtor's affairs. These views appear to be those held by Judge Lowell, of the Massachusetts district, for he says, in *In re Haskell*, 11 N. B. R., 164, "The law requires the debtor to be present, and to answer all inquiries, and the creditors are not bound to act until all such inquiries have been answered, including those by a majority or by a single creditor, and including a due inspection and explanation of the books." The manifest intent of the statute is, not that the question of the propriety of the composition shall be left to be passed upon only by the court, on such information as shall be obtained by the time the court is called upon to act, but that the creditors shall, in the first instance, pass upon its propriety, in view of the debtor's sworn written statement, and of an oral examination of him. The course of the examination must be regulated by the sound discretion of the presiding officer, in accordance with these views. If creditors who are prepared to vote on the resolution, desire to do so without being detained while the examination of the debtor is proceeding, the matter can easily be arranged, by the announcement that the vote will not be taken before a specified

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time, and the creditors who do not desire to remain can depart and return at the designated time, or can give proper authority to others to vote for them. If, when the books of the debtor are produced, it seems necessary that time should be given to have them examined by an expert, the presiding officer must regulate the matter of adjournment in his sound discretion. When the books have been previously examined by a committee of creditors, that circumstance is entitled to consideration on the question of granting time for further examination of the books. Under the language of the General Order, which requires the Register to "hold and preside at" the meeting, and to "report to the court the proceedings thereof, with his opinion thereon," he must be held to possess the power to regulate the form and order of proceedings at the meeting, and to decide questions that arise, subject to review by the court. He must necessarily decide who are entitled to vote, and in respect to what amount of debts, and pass upon the regularity and propriety, in form, of the proofs of debt, and of letters of attorney. Whether he has the right to reject a vote because the claim is disputed on its merits, is a question which must be passed upon by the court hereafter. The answers of the debtor to the inquiries made of him ought to be recorded in writing, in the form of an examination, and the debtor ought to be sworn to the truth of the document, and it ought to be signed by him, after being read over to him. The presiding officer is required by the General Order to report to the court "the proceedings" of the meeting. This implies that the proceedings must be recorded in writing, as they take place, in order to be in a shape to be reported. The examination of the debtor ought to be conducted as the examination of a witness is conducted in court, and he should answer the inquiries made of him by an examining creditor, and do no more until the examining creditor has closed, after which he may, of his own volition, or in answer to inquiries by his own counsel, make such explanations as are relevant.

Some of the foregoing observations are not exactly appo-

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site to the questions certified ; but they have been made in view of suggestions and inquiries addressed to the court by counsel, on the oral hearing, on the questions certified. And, still further, in view of establishing the practice in proceedings for composition, it is proper for me to say that the petition for a composition ought, in order to be in compliance with General Order No. 36, to set forth, not merely the fact that a composition has been proposed by the debtor or bankrupt, but also the nature and terms of the proposed composition, and the belief that such proposed composition will be accepted by two-thirds in number and one-half in value of all the creditors of the debtor or bankrupt, in satisfaction of the debts due from such debtor or bankrupt. The practice heretofore established in this district, of having a second meeting of creditors, called by notice, for the purpose of inquiring whether the resolution for composition has been passed and confirmed in the manner required by the statute, will continue to be observed ; and such second meeting will be held and presided over by the Register designated to hold the first meeting. The forms heretofore used for the three orders, and the two reports, will continue to be used, with the necessary change in the first order to recite the contents of the petition, in the particular before mentioned.

SUPREME COURT—GEORGIA.

A State court will not grant an injunction restraining a party from applying for the benefit of the Bankrupt Law.

*HENRY J. FILLINGIN, Plaintiff in error, v. R. T.
THORNTON, Defendant in error.*

INJUNCTION. Bankrupt. Before Judge Strozier, Randolph county, at Chambers.

Thornton filed his bill against Fillingin, and others who

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have no part in the issue here involved, making substantially this case: Fillingin had a homestead in real and personal property set apart to him under the Act of 1868. On February 28, 1871, complainant, under the provisions of said act for the sale of homesteads, purchased the land so set apart at and for the sum of two thousand dollars, of which purchase-money he has paid all but three hundred and eighty-nine dollars. He took a deed to said property from the defendant and his wife, under the approval of the Ordinary. The defendant has invested the moneys realized, as aforesaid, from the sale of said homestead, in land and personalty now in his possession. The Homestead Act of 1868 has been declared unconstitutional by the Supreme Court of the United States, so far as judgments were concerned obtained prior to the adoption of the Constitution of 1868; and several of such judgments against the defendant have, in consequence of said decision, been levied upon the homestead purchased, as aforesaid, by complainant. In equity, the property purchased with the proceeds of said homestead should be sold, and all the moneys arising therefrom applied to the payment of said judgments. But, to prevent this result, the defendant has threatened to avail himself of the benefits of the Bankrupt Act of the United States, and to claim said property, now in his possession, purchased as aforesaid, as exempt under the provisions of the said act. Amongst other things, the complainant prayed that the defendant be enjoined from filing a petition in voluntary bankruptcy, and from claiming said property as exempt.

The Chancellor granted the injunction as prayed for; and the defendant excepted.

Worrill & Chastain, for plaintiff in error.

H. & J. L. Fielder, for defendant.

TRIPPE, J.—The Constitution of the United States grants the power to Congress to establish “uniform laws on the subject of bankruptcies throughout the United States.” Congress has exercised this power, and enacted a general

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Bankrupt Law for the United States. The State courts will not grant an injunction restraining a party from applying for the benefit of that act. No precedent or reason for the exercise of such a power by a State court was shown in the argument. In truth, all analogous precedents and authorities are to the contrary. The fact that, under the Bankrupt Law, the applicant may have rights that he could not secure under the State law, furnishes no ground. A State may not discharge a debtor from all liability for his debts, whilst that is one of the chief objects of a Bankrupt Law, and the special object of the debtor who seeks the benefit of the act.

The judgment of the Chancellor, so far as the injunction operates to restrain Fillingin from making application for the benefit of the Bankrupt Law, is reversed.

The bill charges the insolvency of Fillingin and wife. The facts are more fully set out in the case of *Gunn et al. v. Thornton et al.*, decided at the present term. That case and this were brought up by separate bills of exceptions, sued out from the decision of the Chancellor, made upon the same bill for injunction, filed at the instance of the defendant in error. The parties to both cases were all parties to the same proceedings below, and that case is referred to for a fuller statement of the facts on this point.

We think the Chancellor committed no error in granting the injunction, so far as it restrains Fillingin and wife from collecting the note given by Thornton for a portion of the purchase-money of the homestead.

Injunction modified.

Longstreth v. Pennock et al.

UNITED STATES SUPREME COURT.

The assignee acquired his title to movable property found upon the premises, subject to the rights of all other persons, and where rent is a lien upon the personal property of the bankrupt, it must be paid first out of the proceeds of the sale.

*LONGSTRETH, Assignee of WATSON & DE YOUNG, v.
PENNOCK et al.*

IN error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

SWAYNE, J.—This is a writ of error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The agreed facts render a statement of the case unnecessary.

The assignee acquired his title to the movable property found on the demised premises, subject to the rights of all other persons.—*Gibson v. Warden*, 14 Wall., 244. The rent in question was for a period which terminated when the assignee took possession, and the entire period was within a year of that time. Before the commencement of the proceedings in bankruptcy, the defendants in error might have distrained; and it is agreed that the property upon the premises was more than sufficient to satisfy the demand. The Statute of Pennsylvania, of June 16, 1836, Section 83, Purdon's Dig., 1873, p. 879, provides that where property under such circumstances is seized and sold under execution, the rent due for a period not exceeding one year shall be paid first out of the proceeds of the sale. This case is within the equity of that statute.—*Sedgwick's Stat. & Const. Law*, 296. The question presented is one belonging to the local law of Pennsylvania. We think it was correctly decided by the Circuit Court.

The judgment is affirmed.

Scott and Nasse v. Kelly, Sheriff.

UNITED STATES SUPREME COURT.

Where the assignee in bankruptcy voluntary submits himself and his rights to the jurisdiction of the State court, he cannot, after judgment, object to the power of the State court to act in the premises and render judgment.

The decision by a State court that the bankrupt had no title, does not present a question of which this court can take jurisdiction in a writ of error.

SCOTT AND NASSE, Assignees of SHAWHAN, v. JOHN K. KELLY, Sheriff of the City and County of New York.

In error to the Supreme Court of the State of New York.

WAITE, J.—The writ of error in this case is dismissed for want of jurisdiction.

The assignees in bankruptcy voluntarily submitted themselves and their rights to the jurisdiction of the State court. Being summoned they appeared without objection, and presented their claim for adjudication by that court. No effort was made to remove the litigation to the courts of the United States. It is now too late to object to the power of the State court to act in the premises and render judgment (*Mays v. Fritton*, 11 N. B. R., 229). The question presented for the decision of the State court was not whether, if the bankrupt had title, it would pass to his assignees by the operation of the Bankrupt Act, but whether he had title at all. The court decided that he had not. Such a decision by a State court does not present a question of which this court can take jurisdiction upon a writ of error.

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UNITED STATES DISTRICT COURT.—E. D. MICHIGAN.

A petition was filed against M. by seven of his creditors. On the hearing of the order to show cause, it appeared that two of the creditors' claims were for amounts less than two hundred and fifty dollars each, but that the five remaining did in fact constitute the requisite number in value and amount.

Held, that the petition was defective in its allegations, and did not make out a case for an adjudication, but that it might be amended so as to conform to the facts.

Affidavits taken before notaries public cannot be read in matters pending before this court.

A fraudulent chattel mortgage on the bankrupt's stock of goods, to secure an alleged debt of several thousand dollars, made with intent to hinder, delay, and defraud creditors, is a sufficient act of bankruptcy to warrant an adjudication.

In an application for a provisional warrant and order of arrest of the debtor, under Section 40 of the Bankrupt Act of 1867, the better practice is to file a separate petition, supported by affidavits of persons having knowledge of the facts, when the same are not stated in the petition of the petitioner's own knowledge.

In the present case, as the main facts are upon information and belief, a provisional warrant and order of arrest will not be granted; but, as sufficient cause does in fact exist for the issuing of a provisional warrant, leave will be given to make another application.

Where the commissioner who took the deposition in proof of debts failed to sign the jurat to the deposition, the omission may be supplied if the commissioner distinctly recollects the fact of the creditor signing and verifying it in his presence, and, if not, the party may be sworn and the deposition filed *nunc pro tunc*.

In re JAMES A. McKIBBEN.

THESE were motions

1. To vacate the order to show cause why McKibben should not be adjudicated a bankrupt, for the reason that, at the time of granting the order, sufficient grounds did not exist, and no proper and lawful showing was made therefor.

2. To vacate the provisional warrant of arrest, on the ground that it did not appear that there was probable cause for believing that McKibben was about to leave the district, or to remove or conceal his property, or to make any fraudulent disposition thereof.

Mr. Don. M. Dickinson for the motion.

Messrs. H. E. Burtand D. C. Holbrook for the petitioning creditors.

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BROWN, J.—The motion to vacate the order to show cause is a very general one, and does not distinctly apprise the petitioning creditors what defects in the proceedings are relied upon; but, as no objection was taken to it upon this ground, I shall proceed to dispose of the case as made upon the argument.

First. Principal objection to the petition is that it does not appear upon its face that the requisite number of creditors have joined in it. The 39th Section of the Bankrupt Act, as amended January 22, 1874, provides that any person who has committed an act of bankruptcy, as defined by that section, “shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts, provable under this act, amounts to at least one-third of the debts so provable.” “And in computing the number of creditors aforesaid who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned.”

The petition in this case alleges that the petitioners “are informed, and believe, that your petitioners constitute one-fourth at least in number, upon the basis of two hundred and fifty dollars and upwards, of the creditors of the said James McKibben, and that the aggregate of their debts, provable under the said acts, amounts to at least one-third of the debts so provable.”

There are seven petitioners. In the statement of their respective demands, contained in the body of the petition, it appears that the claim of A. C. McGraw & Co., one of the petitioners, amounts to only one hundred and sixty-five dollars; and that of W. D. Robinson & Burtenshaw amounts to but one hundred and three dollars.

The question is then distinctly presented whether the requirement that one-third in amount and one-fourth in number of creditors, having claims of two hundred and fifty dollars and over, should unite in the petition, is met by the allegation of seven petitioners that they constitute the

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required number, when in fact two of them hold claims of less than two hundred and fifty dollars each.

The legal effect of this allegation is :

1. That the seven petitioners constitute one-quarter in number of all creditors whose debts exceed two hundred and fifty dollars.

2. That the aggregate of their debts amounts to one-third of the aggregate of all claims provable against his estate.

Two of these petitioners, however, hold claims of less than two hundred dollars. They are not, then, "of" the creditors whose debts exceed two hundred and fifty dollars. And the allegation is, therefore, *pro tanto*, untrue.

Second. But it is claimed that the names and debts of these two may be stricken out as surplusage ; that the court is at liberty to look at the affidavits in proof of the act of bankruptcy, accompanying the petition (to which a schedule of creditors is annexed), and the petitions be allowed to stand as those of the five remaining creditors, it appearing by this schedule that these five petitioners do, in fact, constitute the requisite proportion of creditors authorized to institute proceedings. In the first place, however, I think the petition itself ought to make a complete case for adjudication, and that defective allegations cannot be supplied except by amendments made in the usual manner. If a single material allegation may be thus supplied, I see no reason why all may not, and the entire case thus made by a series of affidavits. The forms prescribed by the Supreme Court contemplate affidavits in proof of the claim of the petitioning creditors, and of the act of bankruptcy ; but I do not understand they can be used to establish a case not made by petition.

In re Keeler (10 N. B. R., 419) it was held that the absence of the allegation as to the number and amount of the creditors in the petition could not be supplied by the admission of the debtor that the requisite number had joined. See also *In re Scull* (10 N. B. R., 165).

In re California Pacific Railroad Co. (11 N. B. R., 193)

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it was held that the court might look at the facts set forth in the petition for an injunction to show that the case made by the petition for adjudication was untrue. But I know of no case where affidavits were admitted to make a new and different case.

Again, I do not see how, by any legal fiction, this petition of seven petitioners can be allowed to stand as that of the five whose debts exceed two hundred and fifty dollars. The allegation that "your petitioners constitute one-fourth at least in number, upon the basis of two hundred and fifty dollars and upwards, of the creditors of said McKibben, and that the aggregate of their debts provable under the said acts amounts to at least one-third of the debts so provable," would have to be interpreted as though it read, "That such of your petitioners as hold claims to the amount of two hundred and fifty dollars constitute one-fourth at least in number, etc."—an allegation to which it is safe to say none of the seven petitioners supposed he was making oath. It was originally filed as the petition of seven, and can no more be treated as the petition of five than of one. If it were true that the five petitioners did not constitute the requisite proportion of creditors, could a prosecution for perjury be sustained against them? An unnecessary allegation may sometimes be treated or stricken out as surplusage, but I have never known of parties to a suit being ejected in this summary manner. Perhaps, if the allegation with regard to the number of creditors were denied by a debtor, and, upon a reference to ascertain whether the requisite proportion had joined, it should appear that a part of the claims were less than two hundred and fifty dollars, yet, if the remainder constituted the requisite proportion, the petition might still be sustained and allowed to stand, as that of the remaining creditors; but I think the petition, as originally filed, should make a *prima facie* case. I must hold, therefore, that the petition is defective, and makes no case for an adjudication.

Third. Can this defect be remedied by amendment? In the only case I have been able to find, where the power to

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amend the allegation with regard to the number of creditors was denied, *In re Rosenfield* (11 N. B. R., 86), decided by my learned predecessor, the refusal was put upon the ground that the allegation was jurisdictional, and therefore could not be amended.

In re David Cornwall, 6 N. B. R., 305 ; s. c., 9 Blatch., 114, the allegation with regard to the claim of the petitioning creditors was treated by Judge Woodruff as jurisdictional, though the power to amend was not discussed. It was also held to be jurisdictional *In re Burch*, 10 N. B. R., 150, and *In re Skelly*, 5 N. B. R., 214. On the other hand, it was expressly held by the District Court of Massachusetts in *ex parte Jewett*, 11 N. B. R., 443, that the allegation in question was not jurisdictional, and the opinion of this court in the *Rosenfield* case was criticised at some length.

Jurisdictional allegations are of two classes :

1. Those strictly jurisdictional, and relating to the subject-matter or the parties. The judgment of a court having no jurisdiction of the subject-matter or parties is null and void, and may be impeached in collateral proceedings, and the record of the court showing such jurisdiction may be contradicted by parol evidence. *Galpin v. Page*, 18 Wall., 350 ; *Storbuck v. Murray*, 5 Wend., 148 ; *Williamson v. Berry*, 8 How., 495 ; *Thompson v. Whitman*, 18 Wall., 457.

2. Allegations of quasi-jurisdictional facts, which must be made and proved, but, when so proved, are *res adjudicata*, and binding in collateral proceedings ; such, for example, as that, in applications for letters of administration, the decedent left no will ; in proceedings *in rem*, under the revenue laws, that the property has been seized by the collector ; and in proceedings to sell real estate for the payment of debts, that the deceased left no sufficient personalty. Examples of these allegations, and of the conclusive character of the judgment rendered under them, are found in the following cases : *Hudson v. Guestier*, 6 Cr., 231 ; *Thompson v. Tolmie*, 2 Pet., 157 ; *ex parte Watkins*, 3 Pet., 193 ; *Grignon's Lessees v. Astor*, 2 How., 319 ; *United States v. Arredondo*, 6 Pet., 691 ;

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Rhode Island v. Mass., 12 Pet., 657; *Griffith v. Bogert*, 18 How., 158; *Florentine v. Barton*, 2 Wall., 210; *Comstock v. Crawford*, 3 Wall., 396; *Dyckman v. The Mayor*, 5 N. Y., 434; *Jackson v. Crawford*, 12 Wend., 533; *Wright v. Douglass*, 10 Barb., 97; *Fisher v. Bassett*, 9 Leigh, 119.

In the recent unreported case of *Michaels v. Post*, in the Supreme Court of the United States, the allegation with regard to the debt of the petitioning creditor is treated as jurisdictional, and the judgment of the District Court as binding in an action by the assignee. In *Betts v. Bagley*, 12 Pick., 572, a similar allegation under the insolvent law of New York was treated as jurisdictional. The court remarks "that the magistrate before whom insolvent proceedings are instituted has jurisdiction of the person, where it is shown that the party petitioning as an insolvent is an inhabitant of the county, and of the subject-matter, where the proceedings are brought before him by a petition purporting to be a petition by the insolvent, in conjunction with persons holding two-thirds of all the debts due from the insolvent to persons residing within the United States." I think, therefore, that the allegation in question is a quasi-jurisdictional one, and falls within the second category above mentioned.

Does it therefore follow that it is not amendable? It was so held, or rather assumed, by my learned predecessor *In re Rosenfield*, above cited; but I think the weight of authority is decidedly the other way. It was held amendable in *ex parte Jewett*, 11 N. B. R., 443, and *In re California Pacific Railroad Company*, *Ib.*, 193.

In re Burch, 10 N. B. R., 150, already cited, the learned judge of the Western District also treated it as amendable. I find no such general doctrine as assumed in the *Rosenfield* case, that a jurisdictional allegation, even in special proceedings, cannot be amended. In *Conelly v. Taylor*, 2 Pet., 556, and in *Jackson v. Ashton*, 10 Pet., 480, the allegation of citizenship necessary to be made to give jurisdiction to the federal court was held to be amendable. See also *Green v. Smith*, 3 Story, 76.

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In attachment proceedings the rule is different in different States. Under the Statutes of Alabama and Georgia they are held not amendable (see *Hall v. Brazleton*, 40 Ala., 406; *Cohen v. Manco*, 28 Ga., 27), while in Iowa, Mississippi, and New York they are treated as amendable. *Bunn v. Pritchard*, 6 Iowa, 56; *Langworthy v. Waters*, 11 Iowa, 432; *Johnson v. Tuggle*, 27 Miss., 836; *Lawton v. Keil*, 51 Barb., 558.

The section of the act in question provides that "if the allegation as to the number or amount of petitioning creditors be denied, and it shall appear that the requisite number have not petitioned, the court may extend the time within which the other creditors may join in the petition." Under this provision, amendments of the petition have been permitted in a large number of cases.

Petitions filed between December 1, 1873, and June 22, 1874, are also permitted to be amended by this provision. As Congress has expressly allowed amendments of all petitions filed between these dates, and of all those where the allegation in question is untrue in fact, I think that courts ought to be equally liberal in allowing them where the allegation is defective in law. While upon ordinary questions, as they arise, I propose to follow the prior decisions of this court without comment, the practice of altogether disallowing amendments in cases of this character would frequently be so disastrous to creditors, and work such obvious injustice, that I feel constrained to take the responsibility of changing it, and of permitting amendments where the facts of the case would seem to justify it. It appears from one of the affidavits in support of the petition (and I think the court may look at the affidavits for this purpose, although not for the purpose of establishing a case not made by the petition) that the five creditors whose claims exceed two hundred and fifty dollars each do constitute the requisite number and amount, and I shall therefore permit the petition to be amended in this regard.

Fourth. Further objection is made that the acts of bankruptcy charged in the petition are not supported by the depo-

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sitions. Twelve affidavits are filed in support of the petition, and of the application for a provisional warrant. One of those is sworn to before a Circuit Court commissioner, and is conceded to be inadmissible. Nine are verified before notaries public, and, I think, are also inadmissible. By the Act of July 29, 1854, notaries public were authorized to "take depositions, and do such other acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect as commissioners to take acknowledgments of bail and affidavits might lawfully take or do." In the case of the *Blake Crusher Company v. Ward*, decided before the publication of the revised statutes, Judge Longyear held that the taking of verifications to bills and answers, and of affidavits in support of motions and injunctions, were "acts in relation to evidence" within the meaning of the above provision, and properly done before notaries. The object of this act, however, was, primarily, to amend the 30th Section of the Judiciary Act of 1789, in relation to depositions *de bene esse*, and to extend the power of taking such depositions to notaries as well as to judges, clerks, and commissioners. The revisors of the statutes so treat it, and in Section 863 they simply inserted the words "notary public" as one of the officers before whom depositions may be taken, and, apparently gave them no power to do "such other acts in relation to evidence" as was held, in the case above cited, to authorize them to take affidavits.

Section 1778 provides that in all cases in which oaths or acknowledgments may be taken before any justice of the peace, they may also be taken before a notary public; but I find no provision by which oaths in general may be taken before justices. They are given power to take complaints for warrants of arrest, and also in certain cases under the Merchants' Seaman's Act, and perhaps in some other minor matters; but I know of no act giving them a general power to take affidavits. I think, therefore, that the nine affidavits in question cannot be read.

The acts of bankruptcy set forth in the petition are :

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1. A fraudulent chattel mortgage on McKibben's stock of goods, to secure an alleged debt of three thousand dollars, made with intent to hinder, delay, and defraud creditors.

2. That McKibben, being insolvent, assigned, transferred, and disposed of his goods and other property, with intent to hinder, delay, and defraud his creditors, and to defeat and delay the operation of the Act.

3. A fraudulent stoppage of payment of commercial paper.

As there is no evidence in the depositions to sustain the last two counts, the only question is whether sufficient appears to show that McKibben made the mortgage specified in the first count with intent to defraud his creditors. The intent need only exist in the mind of McKibben—*In re Drummond*, 1 B. R. Quarto, 10—and is determined by looking at what he has said and done, and the effect thereof. *Ecfort v. Greeley*, 6 N. B. R., 433.

The mortgage was made to Hiram Harrington, September 29, 1874, and purported to cover his entire stock of goods as well as the safe contained in his store, and to secure the payment of three thousand dollars, on or before January 29, 1875, with interest at ten per cent. It was filed in the township clerk's office, October 3. The facts set forth in the depositions are substantially as follows: that McKibben had been engaged in business about two years, during the first year as a partner of Harrington, and after that alone, and as successor of the firm of Harrington & McKibben. That on September 25, 1874, four days before the execution of the mortgage, one Rathbun visited St. Louis, where McKibben did business, and took from him an order for dry goods to the amount of two thousand four hundred dollars. Before sending the order to his principals, and on September 29, the day the mortgage was executed, he took from McKibben the following statement of his property:

Three lots and houses in St. Louis, four thousand dollars; forty-four lots in wife's name, four thousand five hundred dollars; stock on hand, six thousand dollars; outstanding debts, twelve hundred dollars: total, fifteen thousand seven

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hundred dollars. Liabilities : Hiram Harrington's mortgage on three lots and houses, two thousand four hundred dollars ; mortgage on forty-four lots, one thousand dollars ; unsecured claims, two thousand three hundred dollars : total, five thousand seven hundred dollars.

Relying upon the truth of this statement, Rathbun forwarded the order for the bill of goods, and also introduced McKibben to several other business houses in Detroit, of whom and of other eastern creditors before his failure he purchased goods to the amount of about seven thousand five hundred dollars. That on the 18th of February, 1875, learning that McKibben had failed, Rathbun again went to St. Louis, saw McKibben, who admitted giving the chattel mortgage to Harrington, when his attention was called to the apparent loss or deficiency, it having been ascertained by an inventory made upon the foreclosure of the chattel mortgage, that the stock was valued at about two thousand nine hundred dollars. McKibben claimed that the value placed on his stock in September must have been too high, and when reminded that if his stock then and now was about the same, he had nevertheless purchased two thousand five hundred dollars worth more of goods than he had paid of debts, and, asked to account for those two thousand five hundred dollars worth of goods, said that he was unable to do so. Admitted sending off goods to the amount of five or six hundred dollars to other and distant places, but claimed they were old, shopworn, and unsalable ; that he had nothing with which to pay his debts ; that when asked how much he valued his lots at, replied, about two thousand six hundred dollars, and that his wife's forty-four lots were worth about two thousand five hundred dollars.

To Rathbun's counsel, who accompanied him to St. Louis, McKibben stated that he could not tell how much he owed Harrington, and had no means of knowing without consulting him ; that he had paid some of his notes to Harrington, and given others before and after the date of said chattel mortgage. That McKibben refused to show him his books of

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account; that on asking him who his attorney was, he referred him to one Wright; that he refused to go in with him to see his attorney; that Wright also purported to act as the attorney of Harrington, and that both McKibben and Wright refused to meet together with Rathbun's counsel and discuss the matter at all.

There are many other facts set forth in these affidavits with regard to the removal of valuable goods to a large amount, but as they are sworn to only upon information and belief, it is at least doubtful whether they can be considered upon this motion; sufficient, however, appears to make out a *prima facie* case of conveyance with intent to defraud creditors, and to justify an order to show cause.

First. The mortgage covered all the stock of the debtor.

Second. If there was any consideration at all for it other than that already secured by the real estate mortgage, it seems to have been for a precedent debt of two thousand dollars, contracted about a year before, when McKibben bought out the interest of Harrington in the establishment. Harrington up to that time had rested content with personal security.

Three. It was made when McKibben was heavily indebted.

Fourth. On the day it was made, McKibben made a statement of his liabilities, in which the only claim of Harrington was the mortgage of two thousand four hundred dollars, secured on his real estate, no mention was made of the debt secured by this mortgage, if any such existed, nor was anything said about a mortgage being given; he stated the value of his real estate at four thousand dollars, when it was worth, as he afterwards admitted, but two thousand six hundred dollars. The value of his wife's property, stated upon that day at four thousand five hundred dollars, he afterwards admitted was worth but two thousand five hundred dollars.

Fifth. Notwithstanding that, between the giving of the chattel mortgage and his failure, he had purchased goods to the amount of two thousand five hundred dollars more than the amount of debts he had paid, the stock inventoried under

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the chattel mortgage but two thousand nine hundred dollars, when he had stated it in September at six thousand dollars.

Sixth. He refused to show his books of account, was evidently ignorant of the amount he owed Harrington, declined any explanations, and even refused to confer with his creditors in presence of his counsel. I think these facts are sufficient to justify the issuing of an order to show cause. Is there sufficient to justify a provisional warrant for the debtor's arrest and the seizure of his property? The 40th Section of the Bankrupt Law authorizes a provisional warrant, if it shall appear that there is probable cause for believing the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof. No separate petition for a provisional warrant is presented, but the prayer of the petition for the order to show cause, also asks the issuing of a provisional warrant. It was granted upon the prayer of this petition and upon the affidavits already referred to. Where the facts set forth in the affidavits justify the issuing of a provisional warrant, I should be unwilling to vacate it, simply upon the ground that the affidavits were not in the form of a petition, especially where a warrant was prayed in the original petition. See *Morgan v. Quackenbush*, 22 Barb., 73.

Better practice, however, is to file a separate petition, supported by affidavits of persons having knowledge of the facts where the same are not stated in the petition of the petitioner's own knowledge. I think the provisional warrant should not issue except where all material facts are stated upon personal knowledge. In this case, nothing appears tending to show a removal or concealment of property, or fraudulent disposition thereof, except his admission that he had sent off to other places, not to exceed five or six hundred dollars worth of goods, and that they were old, shop-worn, and unsalable.

It is true that deponents swear that they are informed that valuable goods to a much larger amount were sent

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away and disposed of at various places, but this fact is not established by the personal knowledge of any one, and I think sufficient did not appear to justify the issuing of a provisional warrant, the only object of which is to obtain immediate possession of the goods and person of the debtor, pending the appointment of the assignee. As it seems highly probable, however, from the statements of counsel, as to the contents of the inadmissible affidavits, that sufficient cause does, in fact, exist, for the issuing of a provisional warrant, leave will be given to make another application.

Seventh. The only remaining objection to the proceedings is, that the commissioner who took the depositions in proof of debts, failed to sign the *jurat* to the deposition of J. H. Bratshaw. It seems that all parties appeared before Mr. Graves, United States Commissioner, on the 25th day of February, and made oath to the petition and to the depositions in proof of their respective claims, but that he accidentally omitted to sign the *jurat* to Mr. Bratshaw's deposition. As the omission is purely a clerical one, I think it may be supplied. If the commissioner distinctly recollects the fact of Mr. Bratshaw signing and verifying the deposition in his presence, he may sign his name to it as it stands, otherwise the party may be re-sworn, and the deposition filed *nunc pro tunc*.

It is therefore ordered that the petition be dismissed unless the same be amended within ten days; that the respondent be discharged from arrest, and the property seized by the marshal under the provisional warrant be delivered up, but without prejudice to a new application.

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UNITED STATES DISTRICT COURT—OREGON.

1. Where L. & G., of Portland, Oregon, sold wheat to M. & H., of San Francisco, to be delivered on shipboard at Portland, at one dollar and eighty-five cents per cental, and then made a contract with C. & Co., wheat buyers, to purchase said wheat on joint account, each party to furnish one half of the money necessary to make the purchase, and to receive one half of the profits, if any:—*Held*, that the joint venture and interest of C. & Co. in the wheat, ended with the delivery of the same on shipboard, and that thereafter the wheat belonged to M. & H., subject to the power of L. & H., as sellers of the same, to exercise the right of *stoppage in transitu*, and that when, upon the failure of M. & H., said L. & H. exercised said right and took said wheat into their own possession, it was for their own benefit as sellers of the same, and not that of C. & Co., who were not the sellers of the wheat to M. & H., and had no power over it or interest in it.
2. A mere accounting or settlement between an insolvent debtor and creditor, not followed by any actual change or transfer of property, rights, or credits, to the prejudice of other creditors, is not contrary to the Bankrupt Act, but the assignee of such debtor is not bound by such settlement, but may show that it is erroneous, or fraudulent.
3. A preference will not bar the proof of a debt, unless it was given and received by the parties to such debt; and therefore, where a creditor received a preference from the firm of A, B, & C, he is not barred from proving another debt against the firm of B & C.

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William Strong, for the assignee.

John W. Whalley and *M. W. Fechheimer*, for the creditor.

DEADY, J.—On December 16, 1873, a petition in bankruptcy was filed in this court against C. B. Comstock & Co., on which they were adjudged bankrupts on January 23, 1875.

Laidlaw & Gate proved a debt against the bankrupts of twenty-four thousand four hundred and six dollars and thirty cents, gold coin, with interest from November 25, 1873, for money paid said Comstock & Co., on a contract to deliver said L. & G. ten thousand quarters of wheat.

Prior to June 10, 1874, a dividend of forty-three per centum was declared, but not paid, upon this claim, because on that day the assignee of the estate filed objections thereto, to the effect that on December 2, 1873, C. & Co., being insolvent, and indebted to L. & G. in the sum of forty-three thousand eight hundred and nine dollars and sixty-six cents, with interest, to give them a preference and in fraud of the Act, delivered to said L. & G., in part payment of said indebtedness,

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nine thousand two hundred and sixty-eight and ninety-six one hundredths centals of wheat, worth about nineteen thousand four hundred and three dollars and thirty-six cents; and that said L. & G. at the time of said delivery had reasonable cause to believe that C. & Co. were insolvent.

The answer of L. & G. denies the allegations of the objections, and avers that these nine thousand two hundred and sixty-eight and ninety-six one-hundredths centals of wheat were delivered to L. & G. by C. & Co. between November 1 and 13, 1873, upon a contract made on August 29, 1873, and that between November 6 and 10, 1873, L. & G. advanced C. & Co. thirty-one thousand dollars, upon a contract to purchase and deliver ten thousand quarters of wheat, which C. & Co. wholly failed to perform.

After hearing the evidence and arguments of the parties, the Register, Mr. H. H. Northup, on March 6, 1875, found the facts as follows: "On the 29th day of August, 1873, Laidlaw & Gate entered into a contract in writing with C. B. Comstock & Co. to purchase on joint account a cargo of from four thousand to five thousand quarters of wheat, the same being already sold by Laidlaw & Gate at one dollar and eighty-five cents per cental, to whom the wheat purchased by Comstock & Co. was to be delivered, the net profit to be equally divided." (Exhibit A.)

About the 12th of September, 1873, a verbal contract was entered into between Laidlaw & Gate and Comstock & Co., or "rather an arrangement," by which Laidlaw & Gate sold to the firm of Makin & Hubbak ten thousand quarters of wheat at two dollars and fifteen cents per cental. On this contract no money was paid. (Testimony, p. 13.)

On the 30th of October, 1873, Laidlaw & Gate requested and authorized, in writing, Comstock & Co. to purchase on their account fifty thousand bushels of wheat at one dollar and eighty cents per cental. (Exhibit E.) The price was afterwards advanced to one dollar and ninety cents per cental, Comstock reporting that he could not purchase at one dollar and eighty cents.

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On this contract of October 30, 1873, there was advanced by Laidlaw and Gate to Comstock & Co., on the 6th of November, 1873, six thousand dollars, and on the 10th of November, 1873, twenty-five thousand dollars, Comstock reporting that he had purchased, and held in warehouse ready for delivery, wheat to the amount of over that sum in value.

Between the 3d and 12th of November, 1873, Comstock & Co. delivered on board the *Fifeshire* and *Santa Rosa*, two vessels then lying in the Willamette at Portland, nine thousand two hundred and sixty-eight and ninety-six one-hundredths centals of wheat, the delivery being noted on a book kept by Laidlaw & Gate, called "Cargo Book," and credit for so much wheat delivered given to Comstock & Co., although no price was carried out. The agent to receive this wheat on board these vessels was one P. Cherry, who kept the book above-named, an employee of Laidlaw & Gate, although his salary was charged to the "joint adventure," and thus one half of it was paid by Comstock & Co. (Exhibits L & M.)

On November 7, 1873, Laidlaw & Gate drew on Makin & Hubbak, the San Francisco firm to which the wheat was to be shipped, for sixteen thousand one hundred and thirty-two dollars and seventy-four cents, the value of eight thousand six hundred and thirty-one and ninety-eight one-hundredths centals of wheat at one dollar and eighty-five cents per cental and forty-two dollars and fifty-nine cents interest. (Exhibit D.) This draft was dishonored and protested at San Francisco on the 13th of November, 1873, and Laidlaw & Gate immediately advised thereof. At this time Comstock & Co. held a large quantity of wheat, "for," Comstock says, "the failure of Makin & Hubbak left me with a large amount of wheat on hand." Immediately on receipt of intelligence of the failure of Makin & Hubbak, Laidlaw & Gate exercised the right of *stoppage in transitu* over the nine thousand two hundred and sixty-eight and ninety-six one-hundredths centals of wheat loaded on the *Fifeshire* and *Santa Rosa*, and under instructions handed over the charter parties of these vessels to Henry Hewett & Co. of Portland, agreeing with said Hew-

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ett & Co. to take an equal quantity of wheat in warehouse for that placed on board those vessels ; which agreement was consummated.

Some time after the 13th of November, 1873, or perhaps on that very day, a controversy arose between Laidlaw & Gate and Comstock & Co. about this nine thousand two hundred and sixty-eight and ninety-six one-hundredths centals of wheat, not in regard to its delivery, nor respecting the title (for both parties seem to have treated the delivery to Laidlaw & Gate as binding on Comstock & Co., and vesting the title in Laidlaw & Gate), but as to the contract or contracts on which this wheat was delivered. Laidlaw & Gate claimed that it was all on the contract of August 29, 1873 (Ex. A), at one dollar and eighty-five cents per cental. Comstock admitted that about three-fourths of it was delivered on the contract of August 29, 1873, which filled and completed that contract, but claimed that the remaining one-fourth was on the verbal contract of September 12, at two dollars and fifteen cents per cental. This was denied by Laidlaw & Gate, who insisted that the verbal contract of September 12 was void, no money ever having been paid on it, and that if any wheat was delivered after filling the contract of August 29, 1873, it was delivered on the contract or request of October 30, 1873 (Ex. E), at one dollar and ninety cents per cental.

This controversy continued until November 25, 1873, Comstock & Co. refusing to deliver any more wheat until the matter was settled, and claiming damages by reason of large lots of wheat purchased for the verbal contract of September 12, for which he had paid more than one dollar and ninety cents per cental.

On November 25, 1873, a settlement was made, and all prior contracts merged in the contract of that date (Ex. F). On the 2d of December, 1873, a credit appears on the books of Laidlaw & Gate to Comstock & Co. for the nine thousand two hundred and sixty-eight and ninety-six one-hundredths centals of wheat.

The real point to be decided, in my judgment, is, when did

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the title to the wheat in question vest in Laidlaw and Gate?

From the evidence, I find that on the 2d of December, 1873, and for some days prior thereto, Laidlaw & Gate *had reasonable cause* to believe that Comstock & Co. were insolvent, and, if the title remained in Comstock & Co. until the entry on Laidlaw & Gate's ledger, a preference was taken under the Bankrupt Act.

I further find that on the 12th day of November, 1873, the last day on which wheat was delivered, Laidlaw & Gate did not have reasonable cause to believe that Comstock & Co. were insolvent, and that, if the title then passed to Laidlaw & Gate, no preference was taken under the Bankrupt Act.

Laidlaw testifies (p. 45 of testimony) that, after the wheat was delivered on shipboard, Comstock & Co. had no further control over it. This is not controverted or denied, although Comstock was put on the stand. Laidlaw & Gate also, on the 13th of November, 1873, exercised the right of *stoppage in transitu* over this wheat without any question by Comstock & Co., and, more than that, disposed of it without any objection.

The controversy seems to have been as to which contract the wheat was delivered under, and, further than that, as to the amount of damages that Laidlaw & Gate should allow Comstock for other wheat that he then held. It is a recognized principle that the sale is not complete while anything remains to be done to determine its quantity, if the price depends on this, unless this is to be done by the buyer. I think the wheat delivered was treated by both parties as belonging to Laidlaw & Gate; and the fact that credit was not entered in the books of Laidlaw and Gate until December 2, 1873, is not material. Credit for so much wheat was given in the "Cargo Book" at the time of delivery, and the amount of credit, it seems to me, is not material, particularly as neither party then knew the amount of credit to be given, and, by the course of business, this could not be determined until some time after.

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The Register ruled that the proof of debt should stand as made, and the question was certified here for decision.

In the course of the inquiry before the Register, all the dealings between L. & G. and C. & Co. prior to August 29, 1873, consisting of contracts to purchase and deliver wheat to load particular vessels, were examined, and a great mass of testimony introduced which has no special bearing on the controversy.

It being shown by the evidence, and practically admitted, that up to the delivery of this nine thousand two hundred and sixty-eight and ninety-six one-hundredths centals of wheat on the *Fifeshire* and *Santa Rosa*—to wit, November 12, 1873—L. & G. had not reasonable or any cause to believe that C. & Co. were insolvent, it follows that, if the property in the wheat vested in them at the time of such delivery, no preference was thereby given or received.

C. & Co. were engaged in purchasing wheat throughout the country for delivery to third persons for shipment abroad. L. & G. having this contract with M. & H., of San Francisco, to deliver them four thousand or five thousand quarters of wheat in September and October, employed C. & Co., as they had done in other like instances, to purchase the wheat, and deliver it on ship-board for them. Instead of agreeing to pay them a certain commission for their services, it was arranged that C. & Co. should have a share of the profits, if any, made by L. & G. on the venture, and that they should also advance one-half of the money necessary to fulfill the contract.

This being so, the transaction was a joint venture, commencing with the purchase of the wheat and ending with the delivery of it on the vessels at Portland. After the delivery on board, C. & Co. had no interest in the property, and so they seem to have understood the matter.

By the contract of August 29th, C. & Co. did not become parties to the prior contract between L. & G. and M. & H., by which the former sold and were to deliver to the latter four thousand to five thousand quarters of wheat as above

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stated, at one dollar and eighty-five cents per cental. Between C. & Co. and M. & H. there was no privity or relation. If L. & G. made profit on the transaction with M. & H., C. & Co. were entitled to half of it, and L. & G. were liable to them for such share of the profits irrespective of the failure of M. & H. to meet their engagements with L. & G. As the owners of the property, L. & G. exercised the right of *stoppage in transitu* upon the failure of M. & H., and disposed of the wheat to Hewitt & Co., as they had a right to. But for this, the property would have long since figured in the assets of M. & H.

The facts being found as stated, the failure to enter the value of the wheat in the ledger of L. & G. at the time of delivery is immaterial. An entry in the books of a party or the absence of it may be evidence against him of more or less weight, owing to the circumstances, but is not conclusive. In this case the receipt of the wheat by L. & G. from C. & Co. appears to have been regularly and duly entered in the cargo book of L. & G. by their agent and employee, P. Cherry. C. & Co. were duly credited in the ledger with the amount of the wheat, but the *value* of it could not be entered until the cost on board was ascertained or agreed upon. By the terms of the agreement between L. & G. and C. & Co. the latter were to be credited with the wheat at the cost and charges on board, not exceeding the price at which it was sold to M. & H. Owing to the disagreement between L. & G. and C. & Co., as to what contract six hundred and thirty-six and ninety-eight one-hundredths centals of the wheat delivered on the *Fifeshire* and *Santa Rosa* was to be accounted for under—whether that of August 29, at one dollar and eighty-five cents per cental, or that of September 12, at two dollars and fifteen cents per cental, or the order of October 30, at one dollar and ninety cents per cental—and the claim by C. & Co. for damages on account of wheat purchased at a high figure on a falling market under the contract of September 12 and not received by L. & G., there was a delay in ascertaining the value of this wheat and the amount with which C. & Co. were to be credited on account of it. Finally, on November 25, the parties had an account-

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ing and settlement, C. & Co. having the advantage of being L. & G's debtors for thirty-one thousand dollars advanced to them, seem to have dictated the terms of the settlement, by which they were allowed the full price they had paid for all wheat delivered up to that time. The sum due upon the wheat to C. & Co. was deducted from the thirty-one thousand dollars, and for the balance L. & G. proved their claim. This accounts satisfactorily for the delay in making the final entry in the ledger of L. & G.

It is also quite possible that this settlement may have been acquiesced in by L. & G. upon the impression that C. & Co. were in a doubtful condition financially, and that it was better to close with them upon their own terms before they failed. Upon its face the writing wears the look of a device intended to reach backward and give a new color to past transactions with a view of protecting them from some new and impending danger. Its language is probably the result of carelessness or ignorance, or an attempt to cover more ground than was necessary or the facts authorized. While there is no reason to doubt but that it states the result of the settlement truly, to wit, that C. & Co. should be allowed full cost for all the wheat delivered to L. & G., without reference to the limitation of one dollar and eighty-five cents, two dollars and fifteen cents, or one dollar and ninety cents per cental under which it was purchased, yet it does not represent the transaction according to the facts proven by the evidence.

Here is a copy of the agreement, which appears to be in the handwriting of Comstock :

“PORTLAND, OREGON, 25th November, 1873.

“*Messrs. Laidlaw & Gate, Portland*—GENTLEMEN : We have this day sold you, and we confirm the sale by this letter, ten thousand quarters of good merchantable Oregon wheat, to be delivered in Portland warehouses. The price you are to pay us for it is to be the price we actually have paid, with any charges that may be incurred up to the time of delivery. Cash to be paid against warehouse receipts. We acknowledge to have received on account of this sale the sum of

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thirty-one thousand dollars, less the amount of your present debt to us, which is estimated at about six thousand dollars.

“ We are, yours truly,

(Signed)

“ C. B. COMSTOCK & Co.”

No wheat was in fact sold to L. & G. by that agreement or on that date, as therein assumed and represented. The contract of September 12, if valid and binding, was the latest one between the parties for the delivery of wheat, and the last wheat delivered by C. & Co. under any contract or order, was delivered on November 12, 1873.

It is not necessary to the decision of the question arising upon the objections, to find whether L. & G. had reasonable cause to believe that C. & Co. were insolvent at the date of this settlement. But, assuming that they had such cause so to believe, the rights of the general creditors as represented by the assignee, would not be impaired by such settlement. A creditor and debtor have a right to state an account and strike a balance although the former may know that the latter is then insolvent. A mere accounting between parties does not prefer the creditor, or diminish the assets of the debtor. But if the debtor is adjudged a bankrupt, the assignee, representing the general body of creditors, is not bound by such settlement, and if found incorrect or fraudulent it will be disregarded. A settlement or accounting with an insolvent debtor, particularly where the parties, as in this case, use language calculated to make an erroneous impression as to the facts of the transaction, will naturally, if favorable to such creditor, excite the suspicions of the other creditors, and should be closely scrutinized; but in itself, if honestly and fairly conducted, there is nothing illegal or contrary to the Bankrupt Act.

In this case the result of the settlement, however the language in which it is stated may be open to criticism, appears to have been as favorable to C. & Co. as it should, and therefore the other creditors were not prejudiced by it. If, however, the assignee has reason to think otherwise, he is at liberty to raise the question whether the sum claimed—twenty-four

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thousand four hundred and six dollars and thirty cents—was really due L. & G. from C. & Co., on November 25, 1873.

Upon the hearing before the court it was argued by counsel for the assignee that the contracts between L. & G. and C. & Co., of August 29, and September 12, made them partners *inter se* in the purchase and delivery of wheat to M. & H., and that therefore the property in this wheat never vested in L. & G., but remained the property of this special partnership, composed of L. & G. and C. & Co. It is not found by the Register whether this was a partnership transaction or not, and it is immaterial to the decision of the question before the court how the fact is. It is not probable upon this evidence, that the parties intended to constitute a partnership, even between themselves, and unless they did so, none would result. *In re Francis*, 7 N. B. R., 359; s. c., 2 Sawyer, 286. But admitting they were partners, and that this fact in some way, which is not apparent, prevented a delivery of the wheat from being made to L. & G., and from them to M. & H., as is claimed by the creditor, and that the wheat therefore remained the property of this special partnership until it was delivered to M. & H. on shipboard, and that the *stoppage in transitu* by L. & G., members of this partnership, upon the failure of M. & H., restored the wheat to such partnership, what follows? In that case the wheat was never the property of C. & Co., and would not be an asset of their estate in bankruptcy; nor would their creditors be entitled to the benefit of it. On the contrary, it belonged to this special partnership of Laidlaw, Gate, and Comstock & Co., whoever the Co. might be, and was an asset of such firm. The supposed firm of L. G. & C. & Co., made no profits, but a loss. On November 1st, C. & Co. owed this firm of L. & G., as the case may be, twelve thousand six hundred and forty-six dollars and sixty-six cents. The nine thousand two hundred and sixty-eight and ninety-six one-hundredths centals of wheat placed on the *Fifeshire* and *Santa Rosa* cost on board nineteen thousand four hundred and three dollars and forty-six cents, leaving a balance in favor of C. & Co., and against L. G. & C. & Co. of three thousand three hundred and

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seventy-eight dollars and forty cents, that being one-half of the difference between the value of the wheat and the debit to C. & Co. In addition to this C. & Co. owed L. & G. thirty-one thousand dollars.

Now this alleged firm of L. G. & C. & Co. did not owe L. & G. anything, and therefore could not prefer them. But if there had been a preference given by such firm to L. & G., it could not have the effect to prevent L. & G. from proving another debt against a different firm, to wit, that of C. & Co. An unlawful preference only bars the proof of a debt between the parties to the preference. The only effect that can be given to this theory of a special partnership in this case is that L. & G., by appropriating the proceeds of the wheat loaded on the *Fifeshire* and *Santa Rosa*, obtained the said sum of three thousand three hundred and seventy-eight dollars and forty cents of the assets of said partnership more than they were entitled to, and that they are liable to the assignee of C. & Co. for the same. In a suit brought to recover the amount the question would arise whether L. & G. could set off a like amount of the thirty-one thousand dollars which C. & Co. owed them at the time.

But it is unnecessary to further pursue this inquiry. In any view of the matter I think L. & G. are entitled to prove their debt as claimed by them. I am satisfied upon the evidence that whether the transaction between L. & G. and C. & Co. be considered a joint venture, or a special partnership as between themselves, it ended with the delivery of the wheat on shipboard, and that thereafter C. & Co. ceased to have any interest in the property, and that the same was the wheat of M. & H., sold to them by L. & G., who, in relation to it, had the rights of a seller, including that of *stoppage in transitu*.

It is therefore ordered that the proof of debt by L. & G. be allowed to stand, and that they be paid the dividend of forty-three per centum heretofore declared upon it, with the interest accruing thereon, if any.

Henkelman, Jackson & Phelps v. Smith, Assignee.

COURT OF APPEALS—MARYLAND.

If the creditor realizes his money under a judgment entered in an attachment suit without collusion, he may retain it, although the attachment was issued within four months before the commencement of the proceedings in bankruptcy.

A creditor who obtains payment of his debt under a judgment, through the passive non-resistance of the debtor, is not liable to repay the money to the assignee.

HENKELMAN, JACKSON & PHELPS v. C. R. SMITH, Assignee in Bankruptcy of FREDERICK WITTE.

THIS was an action instituted in the Court of Common Pleas, of Baltimore city, by Charles R. Smith, assignee, to recover certain moneys, alleged to have been received by the appellants as a preference. A jury was waived, and the case was tried before the court on the following statement of facts :

AGREED STATEMENT OF FACTS IN THIS CASE.

On the 14th day of April, 1873, Messrs. Henkelman, Jackson & Phelps, the defendants in this case, caused an attachment under Article X., upon the grounds set forth in Section 3 of the Code of Public General Laws of the State of Maryland, to be duly and properly issued out of this court against the lands, tenements, goods, chattels, and credits of a certain Frederick Witte, directed to the Sheriff of Baltimore city, returnable to the May Term, 1873 (which began on the 9th day of May, 1873), of this court, for the sum of \$517.34, due and payable to the said Henkelman, Jackson & Phelps by said Witte. Thereunder certain goods and chattels of the said Witte were seized by the said sheriff, and were subsequently sold by him (the said sheriff), for \$591.40 at public auction, by virtue and in pursuance of an order of this court, duly passed April 24th, 1873, as provided by Section 27 of Article X. of said Code, and the net proceeds thereof, amounting to \$478.22 (the sheriff's and other costs amounting to

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\$113.18), were paid by the said sheriff into this court, to the credit of the said attachment cause, on May 9th, 1873. The sheriff also made the following return in the case upon the short note "*non est*, copy set up at the court-house door."

On the 13th day of May, 1873, judgment of condemnation against the said good and chattels, and the proceeds thereof (\$478.22), and for the said costs of \$113.18, in favor of the said Henkelman, Jackson & Phelps, in accordance with Section 13, Article X., of the said Code of Public General Laws, was duly entered in the case.

On the 4th day of June, 1873, bond under justification, as required by Section 13, Article X., of the said Code, was given by said Henkelman, Jackson & Phelps, filed in the case and duly approved, and on the 5th day of June, 1873, upon petition of Messrs. Henkelman, Jackson & Phelps, this court ordered the said sum of \$478.22 to be paid over to them, which was accordingly done on the same day.

On June 5th, 1873, upon petition filed by certain other creditors of said Witte on May 26, 1873, the said Witte was adjudicated a bankrupt in pursuance of an Act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867.

On July 1st, 1873, Charles R. Smith, the plaintiff in this case, was duly elected assignee in bankruptcy of the said Witte. This action is instituted by said assignee to recover the proceeds of the sale of said goods caused to be condemned and sold by Messrs. Henkelman, Jackson & Phelps, as aforesaid, and it is further admitted that the said assignee had knowledge of said attachment proceedings at the time of his election.

The plaintiff then offered the following prayers :

First. If the jury shall find from the evidence in this case, that Frederick Witte was insolvent, on the 14th day of April, A.D. 1873, and that on said 14th day of April, the defendants in this case issued out an attachment on mesne process, against the goods, chattels, and effects, and property, real and personal, of the said F. Witte, upon which the prop-

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erty of said Witte was attached, and under order of court was subsequently sold for \$591.40, of which sum \$478.22 was subsequently paid to said plaintiffs (now defendants); and shall further find, that when said attachment was brought and said money was received, the said plaintiffs (now defendants) had reasonable cause to believe that a fraud on the Act of Congress, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, was intended; and the jury shall further find that, within four months from the institution of said attachment, proceedings in bankruptcy had been commenced against said F. Witte, upon which he was subsequently adjudicated bankrupt, and that the plaintiff had been chosen assignee of said bankrupt, then the jury shall render their verdict for the plaintiff in this action, for the amount of sales of said goods so seized under said attachment, with interest at the rate of six per cent. per annum, from the 26th day of May, A. D. 1873.

- *Second.* If the jury shall find from the evidence, that Frederick Witte, on the 14th day of April, A. D. 1873, being insolvent, suffered his property to be taken on legal process, by virtue of an attachment on mesne process issued out of the Court of Common Pleas of Baltimore city, by the defendants in the case now at issue, with the intent by such disposition of his property to defeat or delay the operation of the Act of Congress, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; and shall further find that said Frederick Witte afterwards, to wit, on the 5th day of June, A. D. 1873, was adjudicated a bankrupt, upon petition of his creditors, filed the 26th day of May, A. D. 1873, and that the plaintiff in this case was duly appointed assignee of said bankrupt's estate, and that the defendants in this case, when receiving the payment of the proceeds of said attachment, had reasonable cause to believe that a fraud on said Act of Congress was intended, and that said F. Witte was insolvent, then the plaintiff in this case is entitled to recover the sum of \$591.40, the gross

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amount of sales of goods received under said attachment, with interest thereon from the 26th day of May, A. D. 1873.

Third. The plaintiff prays the court to instruct the jury, that if they find the facts set forth in the foregoing prayer, they shall treat the fact that the said F. Witte was insolvent at the time of the payment of proceeds of said attachment, and that proceedings in involuntary bankruptcy had been commenced against him, as evidence of fraud. (Granted.)

And the defendants offered the following prayers :

First. There is no evidence in this cause legally sufficient to enable the plaintiff to recover under any of the counts in the declaration.

Second. That under the pleadings and evidence in this cause, the plaintiff is not entitled to recover.

The court granted the plaintiff's prayers and refused those of the defendants, and judgment was accordingly entered in favor of the plaintiff. From this judgment the defendants appealed.

M. R. Walter, for appellants.

H. D. Loney, for appellee.

GRASON, J.—It appears from the record in this case, that the appellants, on the 14th day of April, 1873, caused an attachment on warrant to be issued against the goods and chattels of Frederick Witte, returnable to the May Term of the Court of Common Pleas of Baltimore city, to be held on the 9th day of May, and that on the 24th day of April an order was passed by said court for the sale of the goods, and that from said sale the sum of \$591.40 was realized, and that said proceeds of sale, less the costs and expenses of sale, were paid into court. On the 13th of May judgment of condemnation was duly entered and said proceeds were paid to the appellants on the 5th day of June following, under an order of court passed on the 4th day of the same month. It further appears that, on the 26th day of May, 1873, a petition in bankruptcy was filed against Frederick Witte by some of his creditors, and that, on the 5th of June, he was adjudicated a

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bankrupt, and that, on the 21st day of July, the appellee was elected assignee of the estate of the bankrupt. On the 6th day of December, 1873, the appellee instituted this suit in the Court of Common Pleas to recover from the appellants the whole proceeds of the sale, which had been paid to them under the order of that court. The case was tried before the court on an agreed statement of facts, and at the trial three prayers were offered by the appellee and two by the appellants, the former of which were granted and the latter refused. The appellants excepted to the granting of the appellee's prayers, and to the rejection of their own, and the judgment being against them they have taken this appeal.

It was contended by the appellee's counsel, that the appellee, under the agreed statement of facts, had a right to recover under either the 14th, 35th, or 39th Section of the Bankrupt Act, and that his three prayers were properly granted. The 35th Section provides that if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor, or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized under execution, etc., the person to be benefited by such attachment having reasonable cause to believe such person insolvent, and that such attachment is in fraud of the provisions of the act, the same shall be void, and the assignee may recover the property, or its value.

The 39th Section declares what shall be an act of bankruptcy, and provides, among others, that if a person, being insolvent, or in contemplation of bankruptcy or insolvency, shall give a warrant to confess a judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or with intent, by such disposition of his property, to defeat or delay the operation of the Bankrupt Act, he shall be deemed to have committed an act of bankruptcy, and the assignee may recover the money or property, if the person shall be ad-

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judged a bankrupt, provided the person taking the property had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent. It will be observed that by the 35th Section, in order to render the attachment void, and enable the assignee to recover, the debtor must be insolvent, or contemplating bankruptcy, must *procure* his property to be attached, within four months before the petition in bankruptcy is filed, *with a view to give a preference*, and the plaintiff in the attachment must have reasonable cause to believe the debtor insolvent, and that the attachment is in fraud of the provisions of the Bankrupt Act. And under the 39th Section, to render the legal process void and to enable the assignee to recover, the debtor must be bankrupt or insolvent, or contemplating bankruptcy, and must *procure* or *suffer* his property to be taken on legal process with intent to give a preference, or to defeat or delay the operation of the act. And if the party be adjudged a bankrupt the assignee may recover, provided the party taking the property had reasonable cause to believe that a fraud on the act was intended, or that the debtor was insolvent. It does not appear from the statement of facts in this case that Frederick Witte, the debtor, has done any act to *procure* the attachment, or to *procure* or *suffer* his property to be taken on legal process with intent to give the appellants a preference over his other creditors, or with intent to defeat or delay the operations of the Bankrupt Act. So far as the statement of facts discloses, he has done absolutely nothing. But it was contended that, as the defendant did not appear to the attachment suit, when it was in his power to do so and prevent the judgment of condemnation, he is to be considered as having suffered his property to be condemned, with intent to give a preference to the appellants. In this view we cannot concur. The Bankrupt Act clearly contemplates *some act to be done* by the debtor to *procure* or to *suffer* his property to be taken under attachment or legal process, and this view is sanctioned by the highest authority, that of the Supreme Court, in the case of *Wilson v. City Bank*, 17 Wallace, 5

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N. B. R., 270 ; s. c., 9 N. B. R., 97 ; s. c., 473, 488. The City Bank obtained a judgment against Vanderhoof Brothers *by default*, and the same day issued execution, which was levied on their whole stock in trade, which was sold. After the levy of the execution and before sale Vanderhoof Brothers were adjudged bankrupts on the petition of other creditors.

Vanderhoof Brothers were insolvent at the time they were sued by the Bank, and the latter had reasonable cause to believe that they were, and that they had committed an act of bankruptcy, and that they had no property other than their stock in trade. The money arising from the sale under the execution was in the Bankrupt Court awaiting the termination of the suit between the assignee and the bank. These facts were found by the court, and are much stronger in favor of the assignee's right, than are those contained in the agreed statement in this case. In that case, as in this, it was contended that the failure of the debtor to appear and defend the suit furnished evidence of his *procuring* or *suffering* his property to be taken on legal process with intent to give the creditor a preference, or to defeat or delay the operation of the law. Mr. Justice Miller, in delivering the opinion of the court, says, in referring to the words "procure," and "procure and suffer," as used in the 35th and 39th Sections respectively, "In both there must be the positive purpose of doing an act forbidden by the statute, and the thing described must be done in the promotion of this unlawful purpose. The facts of the case before us do not show any positive or affirmative act of the debtors, from which such intent may be inferred. Through the whole of the legal proceedings against them they remained perfectly passive. They owed a debt which they were unable to pay when it became due. The creditor sued them and recovered judgment and levied execution on their property. They afforded him no facilities to do this, and they interposed no hindrance. It is not pretended that any positive evidence exists of a wish or design on their part to give this creditor a preference, or oppose or delay the operation of the Bankrupt Act. There is nothing morally wrong in

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their course in this matter. They were sued for a just debt. They had no defense to it, and they made none. To have made an effort by dilatory or false pleas to delay a judgment in the State court would have been a moral wrong and a fraud upon the due administration of the law." In that case the Supreme Court decided, *First*. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings in which a judgment and levy on his property are obtained, when the debt is due, and he is without just defense to the action, is necessary to show a preference to a creditor, or a purpose to defeat or delay the operation of the Bankrupt Act.

Second. That the fact that the debtor, under such circumstances, does not file a petition in bankruptcy is not sufficient evidence of such preference or of intent to defeat the operation of the act.

Third. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the Bankrupt Act.

Fourth. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

In the case now under consideration there is no more evidence to show that Frederick Witte *procured* his property to be taken under the attachment, or *procured* or *suffered* it to be taken on legal process with intent to give a preference to the appellants, or to defeat or delay the operation of the Bankrupt Act, than there was in the case of *Wilson v. City Bank* above referred to, and we think it clear that the appellee has no right to recover from the appellants under either Section 35 or 39.

But it was contended that the appellee had a right of recovery under Section 14. That section provides that as soon as an assignee is appointed and qualified, the judge or register shall assign and convey to the assignee all the estate of the bankrupt, and such assignment shall relate back to the

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commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to such property shall vest in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve such attachment if made within four months next preceding the commencement of said proceedings. We are of opinion that the appellee has no better foundation for his claim to recover under this section than under the 35th and 39th. This section refers and can only refer to attachments which are *pending* at the time the petition in bankruptcy is filed. The petition against Witte was filed on the 26th of May, 1873, he was adjudged a bankrupt on the 4th of June, and the assignee was elected on the 21st of July following. The assignment to him then related back to the 26th of May and vested in him the title to all the property which belonged to the bankrupt at that date. But the property which is the subject of this suit, had been attached on the 14th day of April, was sold under the order of the court on the 24th day of the same month, and the attachment was prosecuted to judgment on the 13th day of May, thirteen days before the petition in bankruptcy was filed, and by that judgment the proceeds of the sale of the property had been vested in the appellants. The attachment having been properly issued and prosecuted to judgment, that judgment is final, imports absolute verity, is conclusive with respect to the subject matter adjudicated, and cannot be re-examined or impeached in a collateral proceeding. *Gordon's Exr. v. Mayor and City Council of Baltimore*, 5 Gill, 231; *Wallus & Harvey v. Munroe*, 17 Md., 501. The judgment in this case cannot therefore be affected by the proceedings in bankruptcy. *Appleton v. Bowles*, 9 B. R., 354; s. c., 2 N. Y., S. C. Rep., 569.

As we have shown that the appellee has no right to recover in this case under either of the sections of the Bankrupt Act before referred to, for reasons stated, it is unnecessary to notice in this opinion the further question, which was argued in this court, whether it is the duty of the assignee in bankruptcy to make known by proper proceedings to the

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State court the fact that the defendant in an attachment has been adjudged a bankrupt. As there was error in granting the appellee's prayers, and in refusing to grant those of the appellants, the judgment appealed from will be reversed, and as the plaintiff can in no event recover in this case a new trial will not be awarded.

Judgment reversed.

CIRCUIT COURT OF THE UNITED STATES—W. D. NORTH
CAROLINA.

If a surplus remains where a bank is in bankruptcy, after the payment of all claims at the amount computed to be due on the date of the adjudication, creditors holding its bills may be allowed interest from the date of the adjudication to the time of payment of dividends.

In re THE BANK OF NORTH CAROLINA.

On the 31st October, 1868, the Bank of North Carolina filed its petition in bankruptcy in the Eastern District of North Carolina. The debts proved amounted to two hundred and seventy thousand dollars, of which two hundred and twenty thousand were bills issued by the bank, payable upon demand, commonly called bank-notes. The debts were paid in full, leaving a large surplus in the hands of the assignee. Interest was allowed and paid on interest-bearing contracts up to the date of the adjudication, and again until the final distribution and settlement. The holders of the bank bills claimed interest from the date of adjudication to the time of payment of dividends, which was refused, and the question certified to the Hon. G. W. Brooks, District Judge, for his decision thereon. Judge Brooks gave it as his opinion that the bill-holders were only entitled to interest from the time they filed their proofs of debt. *Vide* 10 N. B. R., 289.

A petition was then filed with Hon. Hugh L. Bond,

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judge of the Circuit Court of the United States, asking him to review and reverse the opinion of Judge Brooks.

Thomas B. Keogh, in support of the petition, cited Section 19 Bankrupt Act, 1867; Section 25 Insolvent Law, Mass.; *In re Orme*, 1 N. B. R., 57; *In re Haake*, 7 N. B. R., 61; *Brown v. Lamb*, 6 Met., 203; *Williams v. The American Bank*, 4 Met., 317; *The Chemical National Bank v. Bailey*; *Robinson v. Bland*, 2 Burr., 1077.

Hon. A. S. Merrimon, contra.

BOND, J., delivered the following opinion, reversing the decision of the District Judge:

This is a petition on the part of certain creditors of the Bank of North Carolina, an adjudged bankrupt, to be allowed interest on their claims from the date of the adjudication in bankruptcy, there being a surplus fund after payment of all the debts of the bank in full.

The creditors who petition are the bill-holders of the bank.

I can see no just reason why this claim should not be allowed; and a complete answer may be found to all objections made at bar to the allowance of interest, in the very able and elaborate opinion of Chief Justice Shaw in the case of *Williams v. The President and Directors of the American Bank*, 4 Met., 317 (Mass. Rep.); and in the equally clear opinion of Judge Hubbard in the case of *Brown and others v. Lamb*, 6 Met., 203, which exhausts the subject.

The case will be sent to the District Court with directions to proceed accordingly.

HUGH L. BOND,
Circuit Judge.

• Wood v. Bailey, Assignee.

UNITED STATES SUPREME COURT.

An appeal from the District Court to the Circuit will be dismissed unless notice is given to the opposite party within ten days after the entry of the decree or decision appealed from.

The words "defeated party" in Section 4981 must be construed "opposite party," or "successful party," or "adverse party."

CHARLES S. WOOD, Appellant, v. JOHN F. BAILEY, Assignee of JULIUS A. WOOD, a Bankrupt, GAINES WHITFIELD, and HARRIET E. DU BOSE, wife of J. H. DU BOSE.

APPEAL from the Circuit Court of the United States for the Southern District of Alabama.

MILLER, J.—This is an appeal from an order of the Circuit Court for the Southern District of Alabama, dismissing an appeal which the appellant sought to prosecute from a decree of the District Court sitting in bankruptcy.

Bailey, the assignee in bankruptcy of Julius A. Wood, had filed a bill in chancery in the District Court against Charles S. Wood, the present appellant, and Gaines Whitfield, and Du Bose and wife, in regard to a mortgage held by Wood, and a supposed vendor's lien claimed by the other parties on lands owned by the bankrupt and passing to the assignee by the assignment in bankruptcy. The object of the bill was to contest the validity of these liens, and to have a sale of the land discharged of the claims asserted by defendants. The first petition filed by Bailey, which could hardly be called a bill in chancery, was abandoned, and a regular bill in chancery was afterwards filed, in which a subpoena issued which was served on all the defendants, and they appeared, demurred, and answered in regular course of chancery procedure.

Testimony was taken and a final decree rendered in the District Court declaring all the claims of defendants void as liens on the land. This decree was filed in the court on the 21st day of June, 1871, though dated on the 1st day of that month. There is found in the record notices of appeal ad-

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dressed to the clerk of the District Court by the counsel for Wood and by the counsel for Whitfield, both of which are dated and filed in the District Court on the day the decree was filed. But no notice of this appeal was given to Bailey, the assignee, until October 28th, 1871, the date of the marshal's service of said notice of Charles Wood's appeal.

Upon motion of the appellee this appeal was dismissed in the Circuit Court for want of notice in time to the assignee.

The 8th Section of the Bankrupt Act, which provides for this class of appeals, declares that "no appeal shall be allowed in any case from the District to the Circuit Court unless it is claimed and notice given thereof to the clerk of the District Court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from."

We concur with the Judge of the Circuit Court that for want of service of notice of the appeal on Bailey, the assignee, within ten days of the time of filing the decree in the District Court, the appeal must be disallowed. The language of the statute is very strong and admits of no other interpretation.

No appeal shall be allowed *in any case from the District to the Circuit Court*, unless it is claimed and notice given to the clerk, and also to the other party, within ten days after the entry of the decree or decision appealed from.

The failure to give notice to the other party within the ten days, whether claimant or assignee, is equally fatal to the appeal as the failure to give the notice to the clerk that the appeal is claimed.

This is in harmony with the policy of the Bankrupt Law, second only in importance, as we have said in the case of *Bailey, assignee, v. Wier and others*, 12 N. B. R., 24, at this term of the court, to the policy of equal distribution, namely, the necessity of speedy disposition of the bankrupt's assets. In that case this same provision for limiting the time for appeals is referred to as evidence of that policy.

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There is in the statute as above cited what seems to us a manifest clerical error, or verbal mistake, in the use of the words "defeated party," as one to be notified of the appeal, and the error is also found in the revised statutes, Section 4981. The "defeated party in equity" is generally the one who takes the appeal, and does not, therefore, require notice, but must give it. We can see no use or sense in that word in that connection. The purpose of the act, the remainder of the section in which the word is used, and the impossibility of any other reasonable meaning, requires that the word should be construed "opposite party," or "successful party," or "adverse party"—in a word, the party who does not appeal in an equity suit, and who is interested to oppose the appeal.

In any event, the party to be notified in this case was the assignee, Bailey, and he was not notified within the time which the statute makes a condition of the right of appeal, and the decree of the District Court dismissing it is affirmed.

SUPREME COURT OF THE UNITED STATES.

When the issue to be decided is whether a judgment against an insolvent was obtained with a view to give a preference, the *intention* of the bankrupt is the turning-point of the case, and all the circumstances which go to show such intent should be considered.

Hence, when an ordinance of a State gave a preference as to time of trial in the courts, in suits on debts contracted after a certain date, and the insolvent debtor gave his son and niece new notes for an old debt, so as to enable them to procure judgments before his other creditors, the fact that the ordinance was void does not repel the inference of intent to give and obtain a preference; and when a judgment was so obtained, which gave priority of lien, it will to that extent be null and void.

WILLIAM P. LITTLE, Assignee of JOHN R. ALEXANDER, a bankrupt, Appellant, v. T. L. ALEXANDER.

APPEAL from the Circuit Court of the United States for the Western District of North Carolina.

MILLER, J.—This is a bill in equity brought in the Circuit

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Court for the District of North Carolina by Little, as assignee in bankruptcy of John R. Alexander, the father, against T. L. Alexander, the son. The object of the suit is to be relieved from the apparent incumbrance of a judgment of the latter against the former on real estate which comes to the assignee as part of the bankrupt's assets. The judgment was docketed on the 19th day of May, 1869, and on the 1st day of September, within less than four months thereafter, the petition was filed on which the judgment defendant was declared bankrupt.

The question in the case on which the decision of it must turn is, whether the bankrupt intentionally aided in the procurement of this judgment in order to give his son a preference over his other creditors? We are of opinion that he did.

It is quite apparent that, from the close of the late civil war, Alexander, the father, was insolvent, and that this was well known to the son, to whom he was indebted between two and three thousand dollars. He also owed other debts, and his property consisted of two or three parcels of land, and perhaps a thousand dollars' worth of personal property.

By an ordinance of the State Convention of North Carolina of March 14, 1868, which it is not necessary to give in detail, it was provided in effect that, as to debts which were contracted prior to May 1, 1865, judgments could not be rendered before the spring terms of the courts in 1869, and, if there was opposition or defense, they should be continued until the spring terms of 1870. Other obstructions were also interposed to the collection of the class of debts called old debts, by this ordinance. This provision also applied to notes or obligations given after May 1, 1865, which were wholly in renewal of such old debts. But in suits on debts created after that time, or on notes where a part of the consideration was new, judgments could be obtained at the first term after suit was brought. This was the condition of the law as found in the statute books of the State when, on the 1st day of January, 1869, the bankrupt gave his son, the appellee in this case, a note for the old debt and interest, and for twenty

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dollars, then first loaned to him. Nothing can be plainer, we think, considering the relationship of the parties and the known insolvency of the father, than that the purpose of this transaction was to enable the son to get a judgment at the approaching spring term of the court on this note, as a new debt within the meaning of the ordinance, while his other creditors were left to the mercy which that ordinance held out to holders of old debts. If anything else were wanted to make clear this purpose, it is found in the fact that twenty dollars were included in the renewal note for money received at that time, to take it out of the class of renewals for debts wholly created before the 1st of May, 1865.

It adds strong confirmation of this view that a similar renewal was made in favor of Miss Hattie Alexander, a niece of the bankrupt, and in favor of the firm of which the son had been and was then a partner, and in favor of no others. In execution of this purpose suits were brought on these three notes, and judgments obtained on all of them for want of appearance at the May term, 1869, of the State court, while suits brought on other debts were continued until another term.

To break the force of this evidence it is argued that the ordinance which gave this preference of new debts over old was unconstitutional and void. And in point of fact the Supreme Court of North Carolina so decided in January, 1869.

But this decision was made after the new notes were given, and it appears by the evidence that it was very well known at the time the new notes were given that the local judge would enforce the provisions of the ordinance. It is the *intent* with which the new notes were given which must determine the validity of the lien of the judgment; and the unconstitutionality of the ordinance, if the parties believed it would be enforced, can have no influence in repelling the presumption of the intention to give and secure priority of judgment, and by that means a preference.

It is said that this case comes within the principle decided by this court in *Wilson v. City Bank of St. Paul*, (9 N. B. R., 97; s. c. 17 Wall, 473,) because in this case, as in that, the

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judgment creditor had no defense and made none. But no careful reader of that case can fail to see that if the debtor there had done anything before suit which would have secured the bank a judgment with priority of lien, with intent to do so, that the judgment of this court would have been different from what it was.

The Circuit Court in this case submitted the question of fraudulent preference to a jury, but with the opinions of that court in the case, as found in the record, the jury was probably misled as to the law. At all events, in such issues from chancery, submitted to the jury, their verdict is not conclusive, and we think the intent to secure a preference in this case by means of this judgment, both on the part of the bankrupt and the judgment creditor, so clear that we feel bound to reverse the decree and to remand the case, with instructions to enter a decree in favor of plaintiff, that the judgment of T. L. Alexander is void as against the assignee, and is no lien on the property of the bankrupt in the hands of his assignee.

UNITED STATES SUPREME COURT.

A debtor who pays the money under an order of his creditor to a third party, with the intent thereby to enable his creditor to give a preference to such third party, will be deemed to still hold it, and the assignee may sue him for its recovery.

A party who has accepted a draft with intent to enable the drawer to prefer the payee is not liable thereon.

HARRY FOX, WILLIAM B. HOWARD, JOHN WHEAT and CLARK SIPE, Plaintiffs in error, v. EDWIN W. GARDNER, Assignee of NICHOLAS YOUNG, a bankrupt.

In error to the Circuit Court of the United States for the Western District of Wisconsin.

HUNT, J.—The plaintiffs in error, under the partnership name of Fox & Howard, were railroad contractors on a portion of the Chicago and Northwestern Railway. The defendant in error is the assignee in bankruptcy of one Nicholas Young, a sub-contractor under them.

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The contract was made October 4, 1870; the work was finished about November 24, 1870; and full payment became due on December 15, 1870. Subsequently, Young was adjudged a bankrupt in pursuance of a petition in bankruptcy filed against him on the 7th of January, 1871; and on the 12th of September, 1872, the defendant in error, as his assignee, instituted the proceedings which are now before this court for review, to compel the payment of an alleged balance due from the plaintiffs in error to Young.

Under the rulings of the District Court, which were affirmed by the Circuit Court, the jury rendered a verdict in favor of the assignee for the sum of four thousand six hundred and ninety-one dollars and forty-seven cents, of which the principal items were three thousand six hundred and ninety-two dollars and eighty cents, claimed by the plaintiffs in error to have been paid by them to the use of Young before the filing of the petition in bankruptcy, in pursuance of acceptances by them of Young's drafts to that amount, and five hundred and two dollars and twenty cents of orders drawn on Young by various small creditors in favor of one Burroughs, and, as is claimed, with Young's consent, taken by the plaintiffs and charged up against Young and credited to Burroughs before the institution of the proceedings in bankruptcy. The main controversy in the case is as to the validity of these payments under the provisions of the Bankrupt Law of the United States.

To meet these claims the assignee proved that when the bankrupt gave the drafts which are claimed to operate as payment, he was insolvent, and that such insolvency was known to Fox & Howard and to the creditors to whom the drafts were given, that they were given by the bankrupt with intent to afford preferences forbidden by the Bankrupt Act, and that they were accepted by Fox & Howard in fraud of that act.

The contention of the plaintiffs in error is found in the following extract from the brief of their counsel:

"That the court below was mistaken in its construction of

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the 35th Section of the Bankrupt Act. That section does not authorize suits by an assignee against debtors of the bankrupt who have discharged their debts to him, or paid money to other persons for his use, within the period of four or six months specified in the act. It only authorizes suits against such creditors of the bankrupt as have fraudulently received such payments. Only the parties *benefited* by a fraudulent preference under the Bankrupt Act are liable to the assignee.

“The doctrine of the District Court (it is said) leads to the most disastrous consequences. For if a debtor cannot respect the orders of a man in embarrassed circumstances except at his peril, then he will necessarily precipitate the condition of insolvency and bankruptcy which a different course might have prevented. It is believed that this doctrine is contrary to common justice and the established principles of law.”

The 35th Section of the Bankrupt Act provides that a transaction like the one we have presented “shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited.”

The language of the statute authorizing the assignee “to recover the property, or the value of it, from the person so receiving it or so to be benefited,” does not create a qualification or limitation of power. There is no implication that the party paying is not also liable. The words are those of caution merely, and give the assignee no power that he would not possess if they had been omitted from the statute. In the present case the property or value attempted to be transferred belonged originally to the bankrupt. On the adjudication of bankruptcy the possession and ownership of the same were transferred to the assignee. (Section 14.) The attempted transfer by the bankrupt was fraudulent and void. It follows logically that the debtor yet holds it for the assignee, and that the assignee may sue him for its recovery.—(See *Bolander v. Gentry*, 36 Cal., 105 ; *Hanson v. Herrick*, 100 Mass., 323.)

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Upon principle there would seem to be scarcely room for doubt upon the point before us. The pretended payment or transfer or substitution by the debtor of the bankrupt was in fraud of the act and illegal. It was a transaction expressly forbidden by the statute. The jury found that the insolvency of Young was known to Fox & Howard, and to the creditors by whom the drafts were taken at the time they were taken; that they were given by the bankrupt with intent to create forbidden preferences, and that they were accepted by Fox & Howard in fraud of the act. This is a transaction expressly condemned by the statute.

It amounts simply to this: the debtor of the bankrupt seeks to protect himself against an admitted debt by pleading a payment or substitution which was in fraud of the Bankrupt Act, and, therefore, void. The proposition carries its refutation on its face. Fox & Howard were indebted to the bankrupt and can only discharge themselves by a payment or satisfaction which the law will sanction. A payment or transfer condemned by the express terms of the Bankrupt Act cannot protect them.

It is to be observed, also, that when the bankruptcy proceedings were begun Fox & Howard had never, in fact, paid to Burroughs and his associates the amount of the drafts accepted by them. They had simply promised to pay them, if there should prove upon settlement of their accounts with the bankrupt to be so much money due to him. This presents them in a still less favorable condition. They owe money to the bankrupt. They are sued for it by his assignee in bankruptcy. As a defense they allege that they have made an agreement with Burroughs and others, with the assent of the bankrupt, to pay the amount of the debt to them. They allege an agreement merely. This agreement has already been shown to be illegal. The assignee, representing the creditors as well as the bankrupt, is authorized to set up such illegality. The bankrupt perhaps could take no action to avoid this agreement, but his assignee has undoubted authority to do so. When the assignee sets up this illegality and sustains it by

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proof of the facts referred to, the whole foundation of the defense falls.

It is well settled that a debtor may pay a just debt to his creditor at any time before proceedings in bankruptcy are taken. It is also true that a valid agreement to substitute another person as creditor may be made, and may be pleaded as a discharge of the debt in the nature of payment. It is not, however, payment in fact, and is binding only when the contract is fair and honest and binding upon the first creditor.

The right of an insolvent person before proceedings are commenced against him to pay a just debt, honestly to sell property for which a just equivalent is received, to borrow money and give a valid security therefor, are all recognized by the Bankrupt Act and all depend upon the same principle. In each case the transaction must be honest, free from all intent to defraud or delay creditors, or to give a preference, or to impair the estate. (See *Cook v. Tullis*, 9 N. B. R., 433 ; s. c. 18 Wall., 332 ; *Tiffany v. Boatman's Institution*, 9 N. B. R., 245 ; s. c. 18 Wall, 376.

If there is fraud, trickery, or intent to delay or to prefer one creditor over others, the transaction cannot stand.

It is urged that Fox & Howard are liable upon the drafts to the creditors of Young, in whose favor the acceptances were given. Should this be so, it would but add another to that large class of cases in which persons endeavoring to defraud others are caught in their own devices. The law looks with no particular favor on this class of sufferers.

In the present case, however, there seems to be no such difficulty. The acceptances were a part of an illegal contract, and no action will lie upon them in favor of those making claim to them. They are guilty parties to the transaction, and can maintain no action to enforce it. (*Nellis v. Clark*, 20 Wend., 24 ; s. c., 4 Hill, 424 ; *Randal v. Howard*, 2 Black, 585 ; *Kennett v. Chambers*, 14 How., 38.) The law leaves these parties where it finds them, giving aid to neither. The drafts cannot pass into the hands of *bona fide* holders, as, by the terms of the acceptances, they are to remain in the pos-

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session of Fox & Howard until they can be paid by authority of law. When Fox & Howard pay to the assignee the debt due from them to Young, they will pay it to the party entitled to receive it, and will have discharged their liability.

Judgment affirmed.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

A lien, authorized by a statute, on compliance with certain provisions concerning record and notice, is not complete until the statutory requisites are complied with; and if these are postponed until after the filing of a petition in bankruptcy, on which an adjudication follows, no lien will exist.

In re PHILO R. SABIN.

THE Register certifies—that on the 16th day of June, 1874, Johnson & Hunt tendered a deposition of Benjamin G. Johnson, one of the firm, as proof of debt due to them against the above named bankrupt's estate, and which they claimed was secured, by virtue of the statutes of the State of Michigan, by a mechanic's lien upon certain described premises belonging to said estate. The act under which the lien is claimed, after specifying the parties who may "have a lien," and the subjects to which and the conditions upon which it shall apply, declares (new compilation, Section 6790) "such lien shall not attach, unless the said contractor or some one on his behalf shall make and file with the Register of Deeds of the county in which the lands shall lie a certificate containing a copy of the contract," etc., directing the particulars which the certificate must show, the manner of verification and recording it, to which is added a proviso "that no lien created by virtue of this act shall be binding upon the owner, part-owner, or lessee, until he shall have been notified of the filing of such lien with the Register of Deeds."

The proceedings under which the adjudication in bankruptcy in this case was had were commenced on the 20th day of October, 1873, at which time, as I understand the

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effect of the Bankrupt Act and the ruling of this court, the title of the bankrupt to the premises on which the lien is claimed had passed to the assignee in bankruptcy. The proceedings to "attach" the lien under the statutes of Michigan were not commenced until the 23d day of October.

I am not referred to any fact, nor to any principle of law, which will subject the title acquired by the assignee to the lien claimed by the creditors in this case, and having declined to file the proof as a secured claim, I am requested by the claimants to certify the questions arising into court for determination by the District Judge. I send herewith the proof of debt offered by the claimants.

HOVEY K. CLARKE,
Register in Bankruptcy.

The foregoing conclusions and action of the Register are approved.

JNO. W. LONGYEAR,
District Judge.

SUPREME COURT—PENNSYLVANIA.

1. A discharge in bankruptcy is conclusive in the absence of fraud, and cannot be impeached collaterally by a creditor to whom no notice of the proceedings had been given.
2. A refusal to set aside an execution on account of defendant's discharge in bankruptcy is not subject to a writ of error. The remedy in case of such refusal is by writ of *audita querela*, upon which the judgment of the court below is examinable.

HOSEA B. WILLIAMS v. WILLIAM BUTCHER,
PRESIDENT OF AMERICAN GUM PAINT
COMPANY.

ERROR to the Court of Common Pleas of Carbon county.
Per curiam.

We think the learned judge of the court below erred in refusing to set aside the execution in this case. The record of the defendant's discharge as a bankrupt was conclusive in

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the absence of fraud. The plaintiffs were returned as creditors of the defendant, and the presumption is that notice was duly given to them. Where no fraud is proved in obtaining the discharge, it will protect, whether notice was in fact given or not.

But we cannot reverse the refusal of the court below to set aside the execution. The ground of refusal does not appear in the record proper, but is a fact to be proved by the exhibition of the exemplification of the record of the District Court of the United States. The exemplification, being a mere matter of evidence, can be brought into the record only by an *audita querela*, which would be examinable in this court on writ of error to the judgment of the court below in the *audita querela*. We shall, therefore, quash this writ of error, in order to enable the defendant to proceed by *audita querela*, unless the court below should be willing to correct its mistake by opening the discharge of the rule to show cause, and rehearing the case, so as to make the rule absolute.

Writ of error quashed at the costs of plaintiffs in error.

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SUPREME COURT OF THE UNITED STATES.

The District Court may direct the sale of property free from all incumbrances.

The rights of a mortgagee, who was not made a party to proceedings in the District Court, to sell the property, are not affected by the proceedings. When the assignee sells incumbered property without any special order of the court, he sells it subject to all lawful incumbrances, and can convey no better or higher interest than the bankrupt could have done.

JAMES S. RAY, Pub. Admr. of JAMES A. WILLARD, deceased, Plaintiff in Error, v. W. D. BRIGHAM, W. NORSEWORTHY, B. H. NORSEWORTHY, (Administrator, etc.), and GOODRICH & RAILEY.

IN error to the Supreme Court of the State of Louisiana.

• CLIFFORD, J.—Except where the Constitution, treaties, or statutes of the United States otherwise require or provide, the Supreme Court adopts the local law of real property as ascertained by the decisions of the State court, whether those decisions are grounded on the construction of the statutes of the State, or form a part of the unwritten law of the State which has become a fixed rule of property. (*Jackson v. Chew*, 12 Wheat., 153.)

Parks owned one-third of the plantation described in the petition, and it appears that he sold the same to Brigham, and that the latter, to secure the notes given for the consideration, executed a special mortgage to the grantor with vendor's privilege, on the land described in the mortgage. Subsequently the mortgage notes were transferred to the first-named petitioner, and it appears that the mortgagor became insolvent and went into bankruptcy, and that his assignee sold the mortgaged premises to the plaintiff, with five hundred acres of other lands, at a bankrupt sale, free of all incumbrances, and that the purchaser at that sale, in a few days thereafter, sold the same premises to the original owner, taking notes secured by a mortgage of the premises, for the consideration. Credit was given for the payment of the notes, and the purchaser having failed to pay the notes the mortgagee foreclosed

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the mortgage and proceeded to sell the premises, when the transferee of the first mortgage notes, having first caused his mortgage to be rendered executory, filed in the case what is known in the practice of the State courts as a third opposition, claiming the proceeds of the premises by virtue of his special mortgage with vendor's privilege.

Such a proceeding is commenced by petition, and in this case the transferee of the first mortgage notes, with the other third opponents, alleged that they held a special mortgage on the land with a vendor's privilege; that the same has been legally recognized and rendered executory by having passed into judgment, and by a decree that the land should be sold in order to pay the petitioners the sum specified in the petition; that the land is under seizure of the sheriff by virtue of a writ of seizure to pay their debt; that the land has also been seized and advertised to be sold by virtue of the suit between the plaintiff and defendant; that the petitioners have the oldest mortgage on the same, together with the vendor's privilege; that their mortgage being first they are entitled to claim the proceeds of the land, as matter of preference, over any mortgage right of the plaintiff, to the amount of their debt, interest, and costs: wherefore they pray for an injunction, and that the sheriff may be decreed to retain a sufficient amount of the proceeds of the sale to pay their debt.

Other mortgage creditors of the grantee of the original owner intervened, but it will not be necessary to refer with any more particularity to those proceedings, as they do not present any question for decision under the assignment of errors; nor will it be necessary to advert to more than one of the objections submitted by the plaintiff in his answer to the claim to the proceeds of the sale of the land set up by the opponents in the preceding petition, for that is the only one which presents any question re-examinable here, either under the judiciary act or under the more recent act regulating the jurisdiction of this court in such cases.

By his answer he denies that the petitioners have any mortgage of, or privilege in, the land sold, and alleges that he

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acquired all the interest owned by the original defendant in the same by virtue of the sale made by the assignee in bankruptcy, free from all incumbrances, and that all mortgages thereon or privileges existing therein, have been legally canceled and extinguished.

These references to the petition and answer are sufficient to show that the petitioner in such a proceeding assumes the position of a plaintiff, and that the plaintiff in the primary suit assumes in his answer *quoad* the petitioner the position of a defendant. Enough also appears to show that the petitioner claims the fund by virtue of his being the transferee of the first mortgage notes with vendor's privilege, and that the plaintiff claims the same fund upon the ground that the assignee in bankruptcy sold the land free of all prior incumbrances.

Intervention was also made by other parties in opposition to the claim of the petitioners, but it will be sufficient to remark in regard to that proceeding, that they set up the same objection to the claim made by the petitioners as that pleaded by the plaintiff in the primary suit.

Proofs were taken on both sides, and the court of original jurisdiction entered a decree in favor of the petitioners as third opponents, upon the ground that the special mortgage with vendor's privilege, under which they claim, had never been canceled or extinguished, as alleged by the plaintiff in his answer to their petition. Due proceedings were immediately taken by the plaintiff to remove the cause into the Supreme Court of the State, where the parties were again heard; and the Supreme Court of the State affirmed the decree of the subordinate court, and adjudged and decreed that the mortgage claimed by the petitioners in their opposition be and the same is hereby recognized and rendered executory upon the proceeds of the sale of the land described in their petition.

Since the cause was removed here by writ of error to the State court, the plaintiff in the primary suit in the State court assigns the following errors: First, that the State

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court was without jurisdiction over the title which he, the plaintiff, derived under the sale made by the assignee in bankruptcy. Second, that the State court erred in deciding that the first-named petitioner was not a party to the rule to cancel his mortgage and privilege, or to the proceedings in bankruptcy. Third, that the State court erred in deciding that a hypothecary right existed in the petitioner after the discharged bankrupt "was no longer bound for the debt." Fourth, that the State court erred in annulling the proceedings in bankruptcy and the title of the plaintiff under those proceedings. Fifth, that the State court erred in awarding the fund arising from the sale of the land to the petitioners in the subordinate State court.

Separate examination of those several propositions will not be attempted, nor is it necessary, as it is clear that they are all founded in the theory that the title of the petitioners under the first mortgage and privilege was extinguished by the decree of the Bankrupt Court, and that the plaintiff acquired an absolute title to the land from the assignee in bankruptcy, discharged of all prior incumbrances and privileges.

First. Jurisdiction of the Bankrupt Courts extends to all cases and controversies arising between the bankrupt and any creditors who shall claim any debt or demand under the bankruptcy, to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and the due administration of the assets among all the creditors. (14 Stat. at Large, 618.)

Powers of like kind were conferred upon the Bankrupt Courts by the former Bankrupt Act, and the provision in that regard is expressed in substantially the same terms. (5 Stat. at Large, 445.)

Cases involving the construction of that provision were

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several times removed into this court for re-examination, in all of which it was held that the power conferred extended to all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned, because they were matters arising under the act, and were necessarily involved in the due administration and settlement of the bankrupt's estate. (*Ex parte Christy*, 3 How., 292; *Norton v. Boyd*, 3 *Id.*, 426.)

So, where the Bankrupt Court ordered the mortgaged premises to be sold, and directed that the mortgages should be canceled, and that the property should be sold free from incumbrance, rendering to the parties interested their respective priorities in the proceeds, this court decided that the Bankrupt Court did not exceed their jurisdiction, and affirmed their action. (*Houston v. City Bank*, 6 How., 486.)

Corresponding decisions were made by the State court in construing the former Bankrupt Act, which are equally applicable to cases like the one before the court. (*Clark v. Rosenda*, 5 Rob. (La.), 27; *Conrad v. Prieur*, 5 *Id.*, 49; *Lewis v. Fisk*, 6 *Id.*, 159.)

Even if, by the true construction of the 1st Section of the act, any doubt could arise as to the power of the Bankrupt Court to authorize such a sale, it has been well held that it may be derived from the 20th Section of the same act. By that section it is provided that a creditor, having a mortgage or pledge of real or personal property, or a lien thereon, for the security of a debt, shall be admitted as a creditor *only* for the balance of the debt, deducting the value of such property, to be ascertained by agreement between him and the assignee, *or by sale thereof, to be made in such manner as the court may direct.* (*Ex parte Kirtland*, 10 Blatch., 515.)

Beyond all doubt the property of a Bankrupt may, in proper case, be sold by order of the Bankrupt Court free of incumbrance, but it is equally clear that in order that such a proceeding may be regular and valid the assignee must apply to the Bankrupt Court for an order to that effect, and must set forth the facts and circumstances which it is supposed

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justify the application, that the judge may decide whether or not the application shall be granted. Secured creditors in such a proceeding must have due opportunity to defend their interests, and consequently must be properly notified and summoned to appear for that purpose. (*Foster v. Ames*, 2 N. B. R., 455 ; s. c., 1 Lowell, 313 ; *Willard v. Brigham*, 25 La. An., 600.)

None of these conditions were fulfilled in this case. Instead of that the State court finds that the petitioner was never properly notified, and that he was not made a party to the proceeding resulting in the order to sell the property in question free of his prior mortgage, and it was upon that ground that the State court decided that his rights were unaffected by the proceedings.

Concede to the fullest extent the powers of the Bankrupt Court to do everything specified in the Bankrupt Act, still it is clear that the mortgage and privilege of the petitioner could not be canceled and displaced without notice nor without an opportunity to be heard, nor could the proceeds of the sale be adjudged to a junior mortgagee with or without notice, unless for some cause other than what is disclosed in the record. (*Peychaud v. Bank*, 21 La. An., 262.) Notice in some form must be given in all cases, else the judgment, order, or decree will not conclude the party whose rights of property would otherwise be divested by the proceeding. (*Wilson v. Bell*, 20 Wall., 201 ; *Nations v. Johnson*, 24 How., 195 ; *Harris v. Hardeman*, 14 How., 334 ; *Borden v. Fitch*, 15 John., 121 ; *Buchanan v. Rucker*, 9 East., 192.)

No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence without the privilege of showing, if he can, that the pretext for doing it is unfounded. Every person, as this court said in the case of *The Mary*, 9 Cran., 126, may make himself a party to an admiralty proceeding and appeal from the sentence, but notice of the controversy is necessary in order to enable him to become a party. (*Webster v. Reid*, 11 How., 437 ; *Boswell's Lessee v. Otis*, 9 Id., 336 ; *Oakley v. Aspinwall*, 4 Comst., 514.)

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Authorities to the same effect are very numerous, nor is there any well-considered case which gives any support to the proposition that the judgment, order, sentence, or decree of a court disposing of property subject to conflicting claims will affect the rights of any one not a party to the proceeding, and who was never in any way notified of the pendency of the proceeding. (*Weed v. Weed*, 25 Conn., 337; *Means v. Means*, 42 Ill., 50; *Hill v. Hoover*, 5 Wis., 386; *Wallis v. Thomas*, 7 Ves., 292; *Water Power Co. v. Pillsbury*, 66 Me., 427; *Lane v. Wheless*, 46 Miss., 666; *Hettrick v. Wilson*, 12 Ohio St., 136; *Vallejo v. Green*, 16 Cal., 160.)

Such a sale made in such a manner, without notice, may, under some circumstances, be set aside as violating the rights of the prior mortgagee, but the mortgagee may, if he sees fit, affirm the sale and proceed to enforce his priority against the proceeds of the sale, which is the real nature of the proceedings in this case. (*Livaudais v. Livaudais*, 3 La. An., 454.)

Authority is doubtless possessed by the assignee to sell the property of the bankrupt, whether the same is or is not incumbered, but when he sells incumbered property without any special order from the court he sells the same subject to any and all lawful incumbrances, and can convey no better or higher interest than the bankrupt could have done. In such a case it will be taken for granted that the assignee sold *only* such right or title to the property as was vested in him as the representative of the bankrupt, and therefore that he sold it subject to the incumbrances.

Such sales may be made without notice to the secured creditor, but if the assignee desires to sell the property free of incumbrances he must obtain authority from the Bankrupt Court and must see to it that all the creditors having liens on the property are duly notified, and that they have opportunity to adopt proper measures to protect their interests. (*King v. Bowman*, 24 La. An., 506; *Bump on B.* (7th ed.), 156; *In re Kirtland*, 10 Blatch., 515.)

Decree affirmed.

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SUPREME COURT OF THE UNITED STATES.

A creditor who was induced to release his claim without consideration through the fraudulent representations of another creditor, has a debt that will support a petition in bankruptcy.

Where a decree is sought to be reversed for defects in an adjudication, they should be specifically pointed out, and if they consist of matters of fact, the evidence should be the subject of distinct reference.

Where the record shows jurisdiction, an adjudication is conclusive and cannot be impeached in a collateral action. An adjudication is in the nature of a decree *in rem* as respects the *status* of the debtor, and, where the court has jurisdiction, is only assailable by a direct proceeding in a competent court, if due notice was given, and the adjudication is correct in form.

A creditor cannot impeach an adjudication in a collateral action on the ground that it was procured by fraud.

HENRY MICHAELS and NATHAN LEVI, Appellants,
v. HOYT POST, Assignee in Bankruptcy of HARLOW
E. MACARY and HENRY S. MACARY.

APPEAL from the Circuit Court of the United States for the Northern District of New York.

CLIFFORD, J.—Debtors, owing debts to the amount of three hundred dollars, who have committed any one of the acts of bankruptcy enumerated in the 39th Section of the original Bankrupt Act, may be adjudged bankrupts on the petition of one or more of their creditors, the aggregate of whose debts provable under the act amounts to two hundred and fifty dollars, provided such petition is filed within the period therein prescribed.

By that section it is declared to be an act of bankruptcy if such a debtor shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits with intent to delay, defraud, or hinder his creditors, or if, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, he shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, or credits, with intent to give a preference to one or more of his creditors; and the provision is that if such a debtor shall be adjudged a bankrupt the assignee may recover back the

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money or other property so paid, conveyed, sold, assigned, or transferred contrary to that provision, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the Bankrupt Act was intended, or that the debtor was insolvent; and the further provision is that such creditor shall not be allowed to prove his debt in bankruptcy. (14 Stat. at Large, 536.)

Proof, of the most satisfactory character, is exhibited in the record that the debtors described in the bill of complaint were, on the 1st day of December, 1869, adjudged by the District Court of the United States for the district where the debtors resided, to be bankrupts, on the petition of the creditor therein named, and that such proceedings subsequently took place that the complainant was duly appointed the assignee of their estate.

Argument to support those allegations is unnecessary, as they were admitted in open court, and it is equally clear that the assignee was duly qualified, and that all the estate, real and personal, of the bankrupts, was duly assigned and conveyed to the assignee, as required and directed by the 14th Section of the Bankrupt Act. Nor is any discussion of those matters necessary, as they also were admitted at the hearing in the Circuit Court.

Abundant proof is also exhibited to show that the bankrupts, prior to the commencement of the proceedings in bankruptcy, were engaged in business as retail traders, and that they were largely insolvent; that the principal means they possessed, either to pay their debts or to support their families, consisted of a stock of clothing, hats, caps, and other furnishing goods for gentlemen, not much exceeding in value the sum of four thousand dollars, and that they sold and conveyed the whole of their stock of goods, on the 25th of October preceding the date of the decree by which they were adjudged bankrupts, at the instigation and for the exclusive benefit of the appellants, who were their largest creditors.

Such sale and conveyance having been made less than a month and a half before the vendors were adjudged bankrupts.

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the assignee claimed that the sale and conveyance were null and void, and that the attending circumstances were such that it became and was his duty, as such assignee, to take proper measures to cause the goods or their proceeds to be restored, as belonging to the estate of the bankrupts, and to procure, if practicable, a decree that the purchasing creditors should not be allowed to prove their debt against the estate of the bankrupts.

Pursuant to that view the complainant instituted the present suit, in which he alleges, among other things, that the appellants held demands against the bankrupts exceeding four thousand dollars, and that the appellants becoming fearful that they should lose their claim, and being anxious to have the same paid or secured, they, or one of them in behalf of the firm, made a visit to the bankrupts at their place of business, and that while there they took an inventory of their stock of goods and proposed to buy them out and leave the goods in the store of the vendors, and permit them to continue their business and to sell the goods for the vendees at such prices as they, the vendors, could get for the same, and to account to the vendees at the prices which they, the vendees, should mark the goods at the time of the sale, with the right on the part of the vendors to keep the balance for their commissions in selling the goods; that the respondents also proposed, as the complainant alleges, in order to induce their debtors to consent to the proposed arrangement, that they, the respondents, would furnish them additional goods to sell, on the same terms, as they, the debtors, should need thereafter to keep up their stock; and the further allegation is that the respondents also suggested that, in order to have the transaction "look all right," it would be better to have the goods transferred to some third person, naming the one to whom the goods were subsequently conveyed for their benefit.

Objections were at first made by the debtors, but they finally acceded to the proposal, and assigned and transferred their entire stock of goods to the person named by the respondents, he, the nominal grantee, paying therefor the sum of four thousand dollars in money, drafts, and his promis-

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sory notes, all of which were immediately handed over to the persons for whose benefit the sale and purchase were made, and that they gave to their debtors a receipt in full of all demands.

Beyond all doubt the debtors expected to remain in the possession of the goods and to be permitted to sell the same on commission, but the complainant alleges that the nominal vendee in a few days thereafter, acting under the advice and instructions of the real purchasers of the goods, made a demand of the same from the debtors, and that the latter having refused to surrender the possession, the person who made the demand sued out a writ of replevin against the debtors in possession, and succeeded in recovering the goods, which, with a few outstanding accounts, constituted the entire property of the debtors, and that the taking away the said goods from them as aforesaid left them stripped of all means of paying their other creditors, to whom they were largely indebted, and several of whom have since proved their claims against the estate of the bankrupts.

Prefaced by these allegations, the complainant charges in the bill of complaint, that the entire transaction of the pretended sale and transfer of the goods, and of the payment of the price by the money and notes, was but a *scheme* on the part of the respondents to obtain a preference over other creditors within four months before the petition in bankruptcy was filed, in violation of the express provisions of the Bankrupt Act, and that the respondents knew all about the pecuniary condition of the debtors, and knew that their assets were not equal in value to their indebtedness, and that they were insolvent.

Superadded to that, the complainant also charges that the sale and transfer of the goods, and the turning over of the money and notes to the respondents, were not made and done in the ordinary course of the business of the debtors, and that the respondents had reasonable cause to believe at the time of the transaction, that the pretended sale and transfer were made in fraud of the provisions of the Bankrupt Act.

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Wherefore the complainant prays that the sale and transfer may be decreed to be, in effect, a sale and transfer to the respondents, and if not, that they may be decreed to account to him, as such assignee, for the money and notes so turned over and transferred to them as aforesaid, and that the respondents may be decreed to have lost any and all claim to any share or dividend in the estate of the bankrupts.

Service was made, and the respondents appeared and filed an answer, as follows: First. They deny each and every of the allegations and statements of the answer. Second. They allege that the vendee of the goods made the purchase of the debtors without any intention of defrauding, or in any way or manner affecting, the creditors of the vendors, and without any knowledge or information that the owners of the goods had any other creditors that could in any way be affected by the said purchase, and that the purchase was made by him with the consent and approbation of the petitioning creditor in the bankrupt proceedings. Third. That the proceedings in bankruptcy were void and of no effect, and that they were collusive and a fraud upon the Bankrupt Act; that the petitioner in the case was not, in fact, a creditor of the bankrupts, and that the proceedings were instituted and prosecuted at the request and in the interest of the bankrupts, and with their consent, contrivance, and approbation, and by collusion with them. Fourth. That the proceeds of the sale were paid over to the bankrupts, and were received by them, with the consent and approbation of the petitioning creditor, who is their father, and that he was present and consented to all that was done in respect to the sale of the goods and the disposition of the proceeds, and they deny that there are other creditors who would or could institute such proceedings against the bankrupts.

Evidence was taken on both sides, and the parties were fully heard, and the Circuit Court entered a decree for the complainant, as follows: First, that the complainant recover of the respondents, principal and interest, the sum of four thousand two hundred and thirteen dollars and sixty-nine

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cents, and costs of suit. Second, that the respondents be, and they are hereby, adjudged to have lost any and all claim to any share or dividend in the property of said bankrupts, or in any property, money, or effects obtained, or to be obtained by the complainant by this decree, or from any share in the estate of the bankrupts in the hands of the complainant as such assignee.

Subsequently, a final decree was entered, and the respondents appealed to this court. Since that time the appellants have appeared, and filed the following assignment of errors: First, that the Circuit Court erred in adjudging that the complainant recover of the respondents the sum mentioned in the decree, or any sum whatever. Second, that the said court erred in adjudging that the appellants be debarred from any share in the estate of the bankrupts. Third, that the said court erred in not deciding that the proceedings in bankruptcy were wholly void and of no effect, on the ground that the District Court had no jurisdiction of the petition, because the petitioner was not a creditor of the bankrupts. Fourth, that the said court erred in not deciding that the bankrupt proceedings were wholly void, and of no effect, on the ground that the proceedings were fraudulently instituted and prosecuted. Fifth, that the said court erred in deciding that the goods were transferred to the appellants in a manner to constitute a violation of any provision of the Bankrupt Act.

Viewed in the light of the assignment of errors, the objections to the decree of the Circuit Court embody three affirmative propositions, as follows: First, that the proceedings in bankruptcy were void and of no effect, for the reasons which are set forth in the third and fourth assignments. Second, that the decree is in favor of the wrong party, for the reasons set forth in the first and fifth assignments of errors. Third, that the proofs did not warrant the court in adjudging that the respondents should be debarred from any share in the bankrupts' estate.

First. Even a slight examination of the transcript will be

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sufficient to show that neither of the alleged errors is apparent in the record of those proceedings, nor is there anything apparent in the record which affords any support whatever to either of the alleged objections. Instead of that, the record shows that the petition in bankruptcy was in due form, and that all the proceedings antecedent to the decree adjudging the debtors to be bankrupts were regular, and in strict conformity to the Bankrupt Act. Nor is it pretended that there was any irregularity in the proceedings which led to the appointment of the assignee, or in his administration of the bankrupts' estate, or in the assignment and conveyance of the same to him, as required and directed by the 14th Section of the Bankrupt Act.

Such an objection, if made, could not be sustained, as the petition in bankruptcy is set forth at large in the transcript, and it was admitted by the respondents, in open court, that the debtors, on the day heretofore named, were adjudged bankrupts by the said District Court, upon the petition of the creditor named in the petition, and the express admission is that the adjudication was made, in the ordinary manner, upon default, and that an assignment of their effects was made, in due form, to the assignee. Every pretense, therefore, that there is any such error apparent in the record is foreclosed by the stipulation contained in the transcript.

Attempt is made in argument to maintain the first proposition by reference to the evidence reported in the record, but it is clear that the parts of the evidence referred to, when properly understood, afford no countenance to any such theory. What the respondents assume is that the evidence warrants the conclusion that the insolvents were not indebted to the petitioning creditor, and that the proceedings in bankruptcy were instituted and prosecuted by the petitioner in collusion and with the consent and approbation of the insolvent debtors; but it is demonstrable that a proper analysis and construction of the parts of the evidence invoked to sustain that issue will show that the whole theory is utterly destitute of any foundation.

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Unexplained, it may be admitted that the act of the petitioning creditor in discharging his claim against his sons at the time the respondents purchased their stock of goods would afford some support to the assumed theory, but it is quite obvious that the evidence of that act, when weighed in connection with the attending circumstances, proves the very reverse of the theory it is invoked to support. Sufficient appears in the circumstances under which that discharge was given to show that it was procured by the false representations and the gross fraud and deception of the respondents, or of the senior partner of their firm, and that he was acting for the benefit of his partner as well as of himself.

By the pleadings and proofs it appears that the respondents are wholesale clothing merchants, doing business in Rochester, in the State of New York, and that the insolvent debtors mentioned in the bill of complaint, prior to the sale of their stock of goods to the respondents, were retail traders engaged in business at Hudson, in the State of Michigan, owning a stock of goods consisting of such articles of merchandise as those before mentioned, of the value of four thousand dollars. They owed the respondents four thousand five hundred dollars, and were largely in debt to other creditors, amounting in the whole, as estimated by the senior partner of the respondent firm, to the sum of eight thousand dollars. Prior to the sale of their stock of goods to the respondents, or about the time they commenced business, they borrowed two thousand five hundred dollars of their father, no part of which was ever paid, except the sum of three hundred dollars of the principal.

Enough appears to show that the respondent firm became fearful that their debtors would not be able either to pay their debts or to continue their business, and that it was very desirable to enforce payment or to procure security. Doubtless it was such motives that induced the senior partner to make a trip to the place where the insolvent debtors were doing business. Before going there, however, he made a short visit to his brother-in-law, who resides forty miles be-

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yond the place where his insolvent debtors lived. As shown in the proofs, on his return he called at the store of his debtors, the elder of the two being present, the other being sick at his dwelling-house. Conversation ensued in respect to the pecuniary condition of the debtor firm, and the creditor informed the partner present that he came to look over their matters, and he was permitted to examine the goods on hand and to look over their books. Estimates were made by each of them as to the value of the stock, and as they differed in opinion as to its value, they concluded to make an inventory of the same, which was done, and they also computed the debts of the debtor firm and found that their indebtedness amounted to eight thousand dollars, including the amount due to their father. Having completed the examination of the goods and of the books, the respondent remarked that they had got only four or five thousand dollars to pay their whole indebtedness, amounting to eight thousand dollars, and added to the effect that if they did not pay he should remain, and on Monday would throw them into bankruptcy. He did remain, and on the following day (Sunday) dined with his debtors at their dwelling-house, the junior member of the firm being still confined to the house. Monday came, but he did not attempt to institute proceedings in bankruptcy, but proposed that they should sell their whole stock of goods to some third person, to be named by him, for the benefit of his firm; and to induce the debtors to accept the proposal he accompanied it with the assurance that they, the debtors, should remain in possession of the goods, as the agents of the purchasers, to sell the goods on commission, as alleged in the bill of complaint; and that his firm or their agent, the nominal purchaser, would, from time to time, furnish them with additional goods to replenish their stock, to be held and sold by the insolvent debtors on the same terms.

Embarrassed as the owners of the goods were, they were pretty easily persuaded by the threats of the respondent and by the false and fraudulent promises and assurances made in behalf of the respondents, to accept the deceptive, alluring,

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and fraudulent proposals. Objections, indeed, were at first made by the owners of the goods, and one of them inquired of his wily creditor what they should do when their other creditors presented their bills for payment; but the artful negotiator soon silenced every misgiving of that sort by the fraudulent suggestion, as follows: "Pay no attention to them, they can't collect anything."

Difficulties in that quarter having been overcome, it only remained to dispose of the debt which the young men owed to their father. Expedients to accomplish that end were soon devised by the unscrupulous creditor. He advised the young men to communicate with their father, and that he and they, or one of them, should immediately go to the place of the father's residence in order to induce him to relinquish his claim, so that the proposed arrangement could be safely carried into effect. Measures were immediately adopted to notify the father and the brother-in-law of the respondent, who resided in the same place, of their intended visit, for which purpose the respondent sent a telegram to his brother-in-law, of the following terms: "Expect me next train. Tell the lawyer to be in his office." Information of the intended visit was also communicated to the father by the elder son, who was authorized to act for his partner as well as for himself.

On their arrival at the depot of the place of destination they were met by the brother-in-law of the respondent, who had previously been designated as "the third person" to whom the stock of goods was to be conveyed. Notice of their arrival was given to the father by his son, and they went immediately to the office of the attorney-at-law, referred to in the telegram sent by the respondent, and there they met the respondent and his brother-in-law.

Nothing remained to be done to render the scheme successful except to dispose of the debt of the father. Plausible arguments to promote that purpose were presented by the respondent. He commenced the conversation by artful explanations to show that the arrangement suggested was essen-

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tial to save the insolvent debtors from ruin, saying that the boys were in a bad condition ; that he was anxious to help them ; that he did not want to see them thrown out of business.

Enquiry was then made of him by the father of the debtors, what he proposed to do ; to which he promptly replied to the effect following : that he proposed to buy the stock of goods and run the store himself, through a third party, retaining the young men to conduct the business the same as they had done ; that he and his partner would restock the store with such goods as they should need, and keep it stocked for the time proposed to the debtors ; and repeated all the promises and assurances previously made and given to the insolvent debtors, among which were the promise and assurance that the debtors should remain in possession of the goods and be constituted the agents of the purchasers to sell the same, and that they should receive to their own use the net profits of the sales, and should also have their living out of the business.

Beyond all doubt these insidious remarks were intended as an introduction to the proposition to be made to the father of the debtors, which was that in order to effect the arrangement it would be necessary that he should withdraw his claim, so that the purchasers would not be exposed to any trouble in carrying out the proposal, until they should get their pay, when the goods should revert to the debtors. Alluring and plausible as these suggestions were to the father of the insolvent young men, still he inquired in reply whether he ought not to have some writing to insure the performance of the stipulations on the part of the purchasers of the goods, but the respondent immediately remarked that nothing of the kind was necessary, that he had always done by the boys as he agreed and always intended to do so.

Suffice it to say that the colloquy was continued for some time, during which one or two writings were drawn, which were destroyed because they were not satisfactory, and the negotiation terminated in the adoption of the original pro-

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posals made by the respondent, without any writing being given to secure the promises and assurances given, either to the father or the owners of the stock of goods. They, the owners of the goods, executed a bill of sale of the same to the brother-in-law of the respondent, the price being fixed at three thousand four hundred and eighty-two dollars and thirty-four cents, and he paid the consideration by a draft for five hundred dollars, a check for one hundred and seventy dollars and fifty-nine cents, cash two hundred dollars, and three notes signed by the nominal purchaser, each for the sum of eight hundred and seventy dollars and sixty cents. Care was taken at the time that the whole consideration, including the draft, check, money, and notes, should be delivered to the representative of the insolvent debtors, but the evidence shows that he, the debtor, immediately passed over the whole amount to the respondent, who gave a discharge of the debt of his firm. By this contrivance the respondent, through his brother-in-law, became the purchaser of all the stock in trade belonging to the insolvent debtors, which he accepted as a full payment of the debt due to his firm. Agreeably to the arrangement the father of the debtors also withdrew his claim and executed a discharge to his sons for the same without being paid even to the amount of a dollar.

Steeped in fraud as the transaction was, the court here does not hesitate to decide that the discharge procured from the father of his debt against his sons is null and void, and that when he found that all the promises and assurances made and given by the respondent were broken, and that they were evidently never intended to be performed, he had a right to regard his debt as in full force. Proof of a more satisfactory character to establish that proposition can hardly be imagined than that which is exhibited in the record.

Before the week elapsed, the nominal purchaser of the goods visited the bankrupts at their place of business, and, pretending that he had been deceived by them in respect to a lien on the goods, procured from them an assignment of their books, and, failing to induce them to turn over to him the

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only cow they owned, he demanded the goods, and the debtors having refused to deliver the same, he sued out a writ of replevin, and took the same into his possession, leaving them stripped of everything except the cow, which they refused to convey.

Examined in connection with the attending circumstances, it is manifest that the discharge of the debt procured from the father is null and void, because it was obtained by gross deception, misrepresentation, and shameless fraud. Mingled threats and promises induced the insolvent debtors to accept the proposal of the respondent, and every candid and impartial investigator of the facts given in evidence must admit that it was the same appliances, strengthened by the desire of the father that his sons might be able to continue in business, that induced him to execute the discharge. Two thousand two hundred dollars of the principal loaned by him to his sons were still due to him, and he was not paid one dollar for the discharge on the occasion. Nor is there any better foundation for the charge that the proceedings in bankruptcy were instituted and prosecuted in collusion with the bankrupts, and with their consent and approbation, as the charge is not supported by any satisfactory evidence.

Second. Suppose that is so, still it is insisted that the complainant is not entitled to maintain the suit, because the decree adjudging the debtors to be bankrupts was procured by fraud.

Support to that proposition is not found in any defect in the decree of the District Court where it was entered, nor in any of the proceedings which led to it, nor is any reference made in the assignment of errors to the evidence invoked to establish the proposition, unless it be to the charge that the insolvent debtors were not indebted to the petitioning creditor, which has already been shown to be without any just foundation.

Defects of the kind should be specifically pointed out, and if they consist of matters of fact, the evidence to support the assignment should be the subject of distinct reference ; but

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the court is not inclined to rest the decision upon any imperfections in the assignment of errors. Influenced by that determination, the whole evidence reported has been examined, and our conclusion is that the proposition is not proved. Nor is the court inclined to stop there, as we are all of the opinion that the decree of the District Court in such a case is conclusive of the fact decreed, unless when it is called in question in the court where it was entered, or by some direct proceeding in some other court of competent jurisdiction.

Jurisdiction is certainly conferred upon the District Court in such a case, if the petition presented sets forth the required facts, and the court, upon proof of service thereof, finds the facts set forth in the petition to be true ; and it is equally certain that the District Court has jurisdiction of all acts, matters, and things to be done under, and in virtue of, the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings.

Power, it is true, is vested in the Circuit Courts, in certain cases, to revise the doings of the District Courts, and in certain other cases an appeal is allowed from the District Court to the Circuit Court ; but it is a sufficient answer to every suggestion of that sort that no attempt was made in this case to seek a revision of the decree in any other tribunal. Nothing of the kind is suggested, nor can it be ; as the record shows a regular decree, unrevised, and in full force.

Grant that, and still the proposition is submitted that it may be assigned for error that it was procured by fraud, and that such an assignment is valid, even though the decree was introduced as collateral evidence in a suit at law or in equity. But the court here is entirely of a different opinion, as the District Courts are created by an Act of Congress which confers and defines their jurisdiction, from which it follows that decrees rendered in pursuance of the power conferred are entitled in this court to the same force and effect as the judgments or decrees of any domestic tribunal, so long as they remain unreversed or not annulled. (*Parker v. Danforth*,

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16 Mass., 299; *Peck v. Barnum*, 24 Vt., 375; 2 Smith L. Cas., 7th ed., 814.)

Foreign judgments, by the rules of the common law, were only *prima facie* evidence of the debt adjudged to be due to the plaintiff, and every such judgment was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained. Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. (*Lord v. Chadbourne*, 42 Me., 429.) It could only be done directly by writ of error, petition for new trial, or by bill in chancery. (*Cammell v. Sewell*, 3 Hurls. & N., '617.) Third persons *only*, says Saunders, could set up the defense of fraud or collusion, and not the parties to the record, whose only relief was in equity, except in the case of a judgment obtained on a cognovit or a warrant of attorney. (2 Saund. on Pl. and Ev., part 1, p. 63; *Christmas v. Russell*, 5 Wall., 290.)

Judgments of any court, it is sometimes said, may be impeached by strangers to them for fraud or collusion, but the proposition as stated is subject to certain limitations, as it is only those strangers who, if the judgment is given full credit and effect, would be prejudiced in regard to some pre-existing right, who are permitted to set up such a defense. Defenses of the kind may be set up by such strangers. Hence the rule that whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, such third person may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained. (*Crosby v. Leng*, 12 East, 409; *Ins. Co. v. Wilson*, 34 N. Y., 275; *Hall v. Hamlin*, 2 Watts, 354; *Pond v. Makepeace*, 2 Met., 114; *Sid-sparker v. Same*, 52 Me., 481.)

Third persons only, however, can set up such a defense, as the rule is well settled that neither the parties nor those en-

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titled to manage the cause or to appeal from the judgment are permitted to make such defense in any collateral issue. (*Homer v. Fish*, 1 Pick., 435; *Railroad Co. v. Sparhawk*, 1 Allen, 448; *Atkinson v. Allen*, 11 Vt., 619; *Granger v. Clark*, 22 Me., 128; *Hammond v. Wilder*, 23 Vt., 342; *Coit v. Haven*, 30 Conn., 190; *Hollister v. Abbott*, 31 N. H., 442; 2 Phil. Ev., 80, note 291 (5th Am. ed.); *Christmas v. Russell*, 5 Wall., 290; *Peck v. Woodbridge*, 3 Day, 30.)

Unquestionably, a judgment may be impeached for the purpose of showing that it was procured by the debtor for the purpose of avoiding the operation of the Bankrupt Act. Evidence for that purpose is admissible to show—(1) That it was procured within four months prior to filing the petition in bankruptcy, and with a view of giving the plaintiff a preference over the other creditors. (2) That the debtor was insolvent at the time. (3) That the plaintiff had at the time reasonable cause to believe that the defendant was insolvent, and that he procured the judgment to give the plaintiff such a preference. (*Buchanan v. Smith*, 7 N. B. R., 513; s. c., 16 Wall., 277; *Wager v. Hall*, 5 N. B. R., 181; s. c., 16 *Id.*, 584.)

Competent evidence is admissible to prove those facts, but a judgment is no more liable to collateral impeachment in proceedings under the Bankrupt Act, except for the purpose of showing that the judgment in question was designed as a means of avoiding the equal distribution of the debtor's estate among his creditors, than it is to such impeachment in the courts where it was rendered. (*Palmer v. Preston*, 45 Vt., 154.)

Power to establish uniform laws upon the subject of bankruptcy throughout the United States is conferred upon Congress, and Congress having exercised the power it has become an exclusive power. By the Act of Congress the jurisdiction to adjudge such insolvent debtors as are described in the 39th Section of the act to be bankrupts is vested in the District Courts, and it follows that such a judgment is entitled to the same verity, and is no more liable to be impeached collaterally than any other judgments or decrees rendered by

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courts possessing general jurisdiction, which of itself shows that the case before the court is controlled by the general rule that where it appears that the court had jurisdiction of the subject-matter, and that the defendant was duly served with process or voluntarily appeared and made defense, the judgment is conclusive and is not open to any inquiry upon the merits. (2 Smith Lead. Cases (7th ed.), p. 622; Freeman on Jud. (2d ed.), Section 606; *Hampton v. McConnel*, 3 Wheat., 334; *Nations v. Johnson*, 24 How., 195; *D'Arcy v. Ketchum*, 11 *Id.*, 165; *Webster v. Reid*, 11 *Id.*, 437.)

Exactly the same rule is applicable to the case before the court, as it is clear that the District Court had jurisdiction of the petition and that there is not even a suggestion that the notice required by law was not given as the law directs. (*In re Robinson*, 2 N. B. R., 342; s. c., 6 Blatch., 253; *Wimberly v. Hurst*, 33 Ill., 166; *Corey v. Ripley*, 4 N. B. R., 503; s. c., 57 Me., 69; *Ocean Bank v. Olcott*, 46 N. Y., 12; *Fortman v. Rottier*, 8 Ohio St., 548; *Revell v. Blake*, Law Rep., 7 C. P., 300.)

Such a decree adjudging a debtor to be bankrupt is in the nature of a decree *in rem* as respects the *status* of the party, and in case the court rendering it has jurisdiction it is only assailable by a direct proceeding in a competent court, if due notice was given and the adjudication is correct in form. (*Way v. Howe*, 4 N. B. R., 677; s. c., 108 Mass., 502; *Ex-parte Wieland*, L. R., 5 Ch. Apps., 486; *Woodruff v. Taylor*, 20 Vt., 65; *Mankin v. Chandler*, 2 Brock., 125; *Shawhan v. Wherritt*, 7 How., 627; *Imrie v. Castrique*, 8 C. B. N. S., 407; *Carter v. Dimmick*, 4 H. L. Cas., 346.)

Third. Preferences as well as fraudulent conveyances, if made within four months before the filing of the petition by or against the bankrupt, are forbidden by the Bankrupt Act; but three things must concur in order that the transaction may come within the prohibition and be affected by it as an illegal payment, security, or transfer: (1) That the payment, pledge, assignment, transfer, or conveyance was made by the bankrupt, within the period mentioned, and with a view to give a preference to one or more of his creditors, or to a per-

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son having a claim against him, or who was under some liability on his account. (2) That the person making the payment, pledge, assignment, transfer, or conveyance was insolvent, or in contemplation of insolvency at the time the preference was secured. (3) That the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, had reasonable cause to believe that the person was insolvent, and that the payment, pledge, assignment, transfer, or conveyance was made in fraud of the provisions of the Bankrupt Act. (*Wager v. Hall*, 5 N. B. R., 181; s. c., 16 Wall., 584; *Scammon v. Cole*, 5 N. B. R., 257.)

Creditors are forbidden to receive such a preference from such a debtor, and the provision is that if such a debtor shall be adjudged a bankrupt the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to that act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the Bankrupt Act was intended, or that the debtor was insolvent; and the further provision is, that such creditor shall not be allowed to prove his debt in bankruptcy. (14 Stat. at Large, 536.)

Evidently that part of the decree which is the subject of the third complaint is founded upon that provision, and inasmuch as the facts exhibited in the record bring the case in all respects within the regulation there prescribed, it is clear that it was competent for the Circuit Court to render such a decree, and the court here sees no reason to question the action of the Circuit Court.

Decree affirmed.

Ex parte Morris, In re Morris.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A creditor who has bought the debt with intent to prevent the adoption of a pending resolution for composition on the debtor's part, may vote upon it, at the meeting for composition, if he had no motive in the purchase which is fraudulent or oppressive, but only a desire to realize as much as possible from the estate.

The form of oath prescribed for proving debts in bankruptcy need not be followed in voting upon resolutions for composition.

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AFTER the court had refused to confirm the resolution for composition, for irregularity, a new meeting was called, and while it was proceeding, a dissenting creditor bought up some of the debts, giving a little more than the proposed composition would amount to, and publicly offered to buy all the debts at the same rate. Upon taking the vote the resolution was rejected if the purchaser was permitted to vote in respect to these debts. If they were thrown out, it was passed. The facts having been certified by the Register, the bankrupt moved that the resolution be recorded.

R. Stone, Jr., for the debtor, cited *Ex parte Cobb*, 29 Law Times R. (N. S.), 123; *Ex parte Fore Street Purchase Co.*, Law Times (N. S.), 624.

H. R. Brigham for the opposing creditors.

LOWELL, J.—At the former hearing I thought and said that the evidence tended to show that the debtors might have offered a little more than they did; but intimated that it might require a greater discrepancy or some evidence of fraud to make it my duty to refuse a resolution which the creditors had voted.

Before, or at, the second meeting, and before the vote was put, the objecting creditors bought up enough of the debts to enable them to defeat the resolution.

It is insisted that the debts thus bought ought not to be reckoned or permitted to be voted upon at the meeting. The

Ex parte Morris, In re Morris.

English cases cited show that where debts have been purchased in order to carry a composition the resolution will be held to be tainted with fraud. I do not think that the like rule can always be applied to the purchase by a dissenting creditor. In the one case the evidence tends almost conclusively to prove that there must be some motive at work besides the interests of the creditors. For instance, where the composition offered was two shillings and six pence, and the purchase was made at ten shillings, the court had a right to infer that there was some secret contract to reimburse the purchaser, and whether there were or not, the transaction amounted to a corrupt preference to the creditor whose debt was bought. The vote of assent was virtually his; and he had been paid more than the others.

Such cases are common, and are held fraudulent in all courts, whether they relate to discharges in bankruptcy, to compositions at common law, or in any other way in which such a question can be brought up.

But I have never known a case in which a creditor has been bribed not to assent to a debtor's discharge, or not to sign a composition deed. There would not usually be any inducement to fraud on that side; though, possibly, there might be oppression.

I do not mean to say that clear evidence of hostility or spite, for the indulgence of which an enemy may be willing to pay, would not authorize the rejection of his vote. But there is no such presumption of an improper motive, as there was in the cases cited, because its existence is very improbable.

Looking at the facts here, it seems probable that the purchaser of these debts may have supposed that the debtor's assets would fairly pay all that he has chosen to give for these debts. This agrees with the impression which the evidence left upon my own mind; and if this is so, I see neither fraud nor oppression in the action of the creditor.

I said in my former opinion that a debtor appears to have, under the statute, a margin between what he can real-

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ize from his assets, and what even an honest and skillful assignee in bankruptcy can obtain; and if the creditors can fairly manage to defeat the debtor's attempt to realize this margin, thinking perhaps that they shall thus secure it for themselves, I cannot hold this to be a reason for rejecting their votes. It is their property, after all, that he is saving for himself.

It was argued that by Section 22 of the Bankrupt Act, no debt is provable which is procured for the purpose of influencing the proceedings in bankruptcy, because the creditor must swear that he has not procured it for that purpose; and that we ought to adopt the analogy in proceedings for composition.

I have known very few cases either under the Bankrupt Act, or the law of Massachusetts, from which this form of oath was borrowed, which have touched this matter. I do not know what it means. I see nothing objectionable, in itself, in a person's buying a debt for the sake of influencing the proceedings; excepting in the direction of the bankrupt's interests, or of some particular interests in opposition to those of the creditors generally. I do not believe the oath has had the least effect upon the settlement of cases in bankruptcy, nor do I consider it to be required of creditors voting upon a resolution of composition. Indeed, no oath is required of them in ordinary cases. That debts may be assigned, pending the proceedings in bankruptcy, is settled; and it is taken for granted as applied to compositions in the English cases. This being so, I think we ought to follow the true reason of the matter and refuse to recognize those transfers only which are fraudulent or oppressive.

Motion to record resolution denied.

Sloan v. Lewis.

UNITED STATES SUPREME COURT.

Accrued interest constitutes part of a debt provable against the estate of the bankrupt, and may be used to uphold involuntary proceedings.

Where the record shows jurisdiction, an adjudication cannot be assailed in a collateral action.

A record cannot be impeached without previous notice by proper form of pleading.

SLOAN v. LEWIS.

IN error to the Supreme Court of the State of North Carolina.

WAITE, C. J.—This action was commenced by an assignee in bankruptcy in a State court, to set aside certain conveyances made by the bankrupt, in fraud of the Bankrupt Law, as is alleged. The proceedings in bankruptcy, under which the assignee was appointed, were involuntary, and one of the defenses in the action is, that the adjudication of bankruptcy was void, because the record shows that the debt owing to the petitioning creditor was less than two hundred and fifty dollars, and consequently, the court had no jurisdiction in the premises. This defense presents the only federal question there is in the case. If this is decided against the plaintiff in error, our jurisdiction is at an end, and we need not look further into the record.

The principal of the debt owing to the petitioner as described in the petition, is a few cents less than two hundred and fifty dollars; but, by adding the interest to the time of filing the petition, the indebtedness is increased to an amount far in excess of the requisite sum. The Bankrupt Act (Section 39) provides for an adjudication of involuntary bankruptcy upon the petition of one or more creditors, the aggregate of whose debts provable under the Act amounts to at least two hundred and fifty dollars. It becomes necessary, therefore, to ascertain what constitutes a debt that may be proved. The plaintiff in error contends that it is limited to the principal of a sum of money owing, while the assignee claims that it includes the principal and all accrued interest.

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To determine this question, we must look, in the first place, to the Act itself. If the intention of Congress is manifest from what there appears, we need not go further. Section 19 provides, "that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt." And again, "all demands against the bankrupt, for or on account of any goods or chattels wrongfully taken or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest."

There is certainly nothing here which in express terms excludes interest from the provable debt. On the contrary, there is the strongest implication in favor of including it. The object is to ascertain the total amount of the indebtedness of the bankrupt at the time of the commencement of the proceedings, and also the amount of this indebtedness owing to each one of the separate creditors. Accrued interest is as much a part of this indebtedness as the principal. It participates in dividends when declared, precisely the same as the principal. One has no preference over the other, and for all the purposes of the settlement of the estate, the bankrupt owes one as much as he does the other. Creditors prove their debts in order that they may participate in the management and distribution of the estate. Their influence in the management and their share on the distribution depend upon the amount of their several debts which have been proven. Hence, in order to fix the equitable representative value of a debt not due, provision is made for a rebate of interest. But if interest is to be rebated on debts not due, why not, upon the same principle, add it to such as are past due?

The provision for adding interest to the value of goods wrongfully taken and converted is equally significant. Certainly no good reason can be given for withholding interest

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in cases arising upon contract and allowing it in cases of tort, and because it is expressly given in the last and no provision is made for it in the first, the conclusion is irresistible that it was expected to follow the contract as part of the obligation.

We are all, therefore, clearly of the opinion that accrued interest constitutes part of a debt provable against the estate of a bankrupt; and if it does, it is necessarily part of a debt which may be used to uphold involuntary proceedings. It is only necessary, upon this point of jurisdiction, that the petitioning creditors should have owing to them from the debtor they wish to pursue, debts provable under the Act to the required amount. The English cases referred to in the argument, in our opinion, have no application here. They are predicated upon the English statutes and the established practice under them. Our statute is different in its provisions, and requires, as we think, a different practice.

This is conclusive of the case. The petition filed in the bankrupt proceedings distinctly averred that the debts due the petitioner exceeded the sum of two hundred and fifty dollars, and, if interest is added, the particular indebtedness specified amounts to more than that sum. The court found this allegation true. That finding is conclusive in a collateral action. We have so decided in *Michael v. Post* 12 N. B. R., 152; at the present term. Where the record shows jurisdiction, an adjudication of bankruptcy can only be assailed by a direct proceeding in a competent court. Evidence, therefore, to show that payments had been made which reduced the indebtedness below the required amount was inadmissible under any form of pleading in an action like this; but it is especially so in this case, because there is no averment in the pleadings contradicting the record. The sole objection is, that upon the face of the record the error is apparent. A record cannot be impeached without previous notice by proper form of pleading.

The judgment is affirmed.

Sandusky v. The First National Bank of Indianapolis.

UNITED STATES SUPREME COURT.

A proceeding in bankruptcy from the time of its commencement until the final settlement of the estate is but one suit.

A decision upon a petition to have an adjudication set aside can only be reversed under the supervisory jurisdiction of the Circuit Court.

No appeal lies to the Supreme Court from a decision of the Circuit Court upon a petition to have an adjudication set aside.

HARVEY SANDUSKY, Appellant, v. THE FIRST NATIONAL BANK OF INDIANAPOLIS.

APPEAL from the Circuit Court of the United States for the Southern District of Illinois.

WAITE, C. J.—On the 25th of August, 1871, the First National Bank of Indianapolis filed a petition in the District Court of the United States for the Southern District of Illinois to have Harvey Sandusky adjudged a bankrupt. Sandusky appeared on the 5th of September, and, denying the allegations against him in the petition, demanded a trial by jury. This demand was afterwards withdrawn by his attorneys, and, on the 30th of January, 1872, he was in due form adjudged a bankrupt by the court. Afterwards an assignee was chosen and qualified, who proceeded with the settlement of the estate.

On the 9th of December, 1873, Sandusky served upon the bank a notice, as follows :

“ In the matter of the petition of the First National Bank of Indianapolis, v. Harvey Sandusky.	}	In bankruptcy.
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“ *To the First National Bank of Indianapolis, and Messrs. Stuart, Edwards & Brown, its attorneys :*

“ You are hereby notified that on the 10th day of Decem-

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ber, 1873, at 10 o'clock A.M., before the Hon. Samuel H. Treat, judge of said court, at chambers, the said Harvey Sandusky will move the court for leave to file his petition in the above-entitled cause, for a review of the proceedings in said cause, and to vacate the decree of bankruptcy therein, and for other relief, which petition the said Harvey Sandusky has this day placed in the hands and in the office of the clerk of said court for your examination.

“ HARVEY SANDUSKY,
“ By HUFF & LANGDON, &
BRACKET & REILEY,
“ *His Attorneys.*”

On the 10th of December the following entry was made in the cause :

“ WEDNESDAY, *December 10, 1873.*

“ Before the Hon. Samuel H. Treat, judge.

“ In the matter of Harvey Sandusky, } In bankruptcy.
bankrupt.

“ And now on this day came Harvey Sandusky, by his counsel, Huff & Langdon, and Bracket & Reiley, and the petitioning creditor, The First National Bank of Indianapolis, and Joseph G. English, the assignee, by Stuart, Edwards & Brown, their counsel, and on motion of Sandusky, leave is given him to file his petition herein, which is accordingly done ; and on his further motion it is ordered by the court that the said First National Bank of Indianapolis and Joseph G. English file their answers to said petition on or before the first Monday of January next.”

The petition was addressed to the court “ in bankruptcy sitting,” and prayed “ for a review of the record of the said proceedings in bankruptcy ; that the decree declaring your petitioner a bankrupt be set aside and vacated, and the amended and original petition of the said bank be dismissed, and that your petitioner’s estate be restored to him. And

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for such other and further relief in the premises as may be equitable and just."

No defendants were named in the petition and there was no prayer for process. An answer was filed by the bank, and also by George W. Parker, who acted as the agent of the bank in the original proceedings. The assignee did not answer. Testimony was taken, and on the 12th of June, 1874, after full hearing, the petition was dismissed. Sandusky then prayed an appeal to the Circuit Court, which was allowed, and on the 25th of June that court affirmed the judgment of the District Court. He then appealed to this court. A motion is now made to dismiss this appeal for want of jurisdiction.

To authorize an appeal to this court from the judgment or decree of a Circuit Court reviewing the action of a District Court under its bankruptcy jurisdiction, the case must be one in which an appeal may be taken from the District to the Circuit Court; that is to say, it must be a case in equity arising under or authorized by the Bankrupt Act. (Rev. Stat., 4980.)

In our opinion this is not such a case. A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit, are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.

Applications for such re-examination may be made by motion or petition, according to the circumstances of the case. Such a motion or petition will not have the effect of a new suit, but of a proceeding in the old one.

In this case Sandusky had been adjudged a bankrupt in

In re Gies.

a suit to which he was a party. He desired to have that adjudication set aside, and accordingly filed his petition in the District Court for that purpose. This petition was filed in the original cause. It was in no sense whatever a bill in equity to impeach the adjudication for fraud. It had none of the forms of such a bill. On the contrary, it had all the forms of a petition for a rehearing in the original suit, and at the express request of Sandusky was filed as a petition in that suit. It thus became part of the proceedings in bankruptcy, from which it cannot be separated. No appeal could be taken from the whole proceeding, and, consequently, none can be taken from this as one of the parts. The only remedy provided for the correction of errors in such cases is to be found in the supervisory jurisdiction of the Circuit Courts under the provisions of the first clause of the 2d Section of the Bankrupt Act. (Rev. Stat., Section 4976.) From the decisions of the Circuit Court in the exercise of that jurisdiction no appeal lies to this court. It has been many times so decided.—(*Morgan v. Thornhill*, 5 N. B. R., 1; s. c., 11 Wall., 65; *Hall v. Allen*, 9 N. B. R., 6; s. c., 12 Wall., 452; *Mead v. Thompson*, 8 N. B. R., 525; s. c., 15 Wall., 635; *Marshall v. Knox*, 8 N. B. R., 97; s. c., 16 Wall., 551; *Coit v. Robinson*, 9 N. B. R., 289; s. c., 19 Wall., 274; *Stickney v. Wilt*, 11 N. B. R., 97.)

The appeal dismissed.

DISTRICT COURT—E. D. MICHIGAN.

Attorneys of a voluntary bankrupt are not entitled to payment from the assets as preferred creditors for their services in preparing petition and schedules, but may prove their debt in the usual manner.

In re FREDERICK GIES.

PETITION for allowance from the bankrupt's estate of an attorney's fee of one hundred dollars for services in preparing debtor's petition and schedules in a case of voluntary bankruptcy; also for reimbursement of thirty dollars and seventy cents Marshal's fee, advanced by petitioner.

In re Gies.

BROWN, J.—The primary object of a debtor's petition being to obtain a discharge, the expenses of preparing petition and schedules have not been usually allowed as a preferred debt. Such seems to be the settled practice in most of the districts. (Bump on Bankruptcy, 7th ed., p. 225.) It was so held in an early case in the Southern District of New York (*In re Hirschberg*, 2 Ben., 466; s. c., 1 N. B. R., 642), and the same principle was afterward applied to claims for services in preparing schedules in a case of involuntary bankruptcy. (*In re Bigelow*, 2 N. B. R., 371; s. c., 3 Ben., 146; see also *In re New Lamp Chimney Company*, 2 A. L. J., 343; *In re Evans*, 3 N. B. R., 261.)

The question was fully discussed by the late Judge Hall in the case of *Jaycox & Green*, 7 N. B. R., 303, in which it was held that attorneys of the bankrupt were general creditors, and must prove their debt in the usual form for all services rendered prior to adjudication.

A contrary rule seems to have been adopted *In re Kennedy*, 20 Pitts' L. J., 193; but I am unable to say upon what ground this decision is placed, as the authority is not obtainable here. I have no doubt that an attorney may demand and receive a reasonable compensation before rendering his services, and that the payment therefor would be valid. I think he may also take a mortgage or other security for the payment of his fees, notwithstanding the contrary decision in the case of *Evans*, 3 N. B. R., 261, provided that the claim be reasonable in amount and the security be taken before or at the time the services are rendered. In the case of *Comstock and Young*, 5 N. B. R., 191, the learned judge of the Western District decided that the debtor had a right to appear and defend himself against a petitioner in bankruptcy, and although unsuccessful in his defense the court had a right to allow him such expenses as might be just and proper, including attorney's fees, to be paid from the assets; but with the single exception of *In re Kennedy*, above cited, I know of no case where it has been held that the attorney of a voluntary bankrupt was entitled to payment from the estate for his services in preparing petition and schedules. So far as I am ac-

In re Bennett et al.

quainted with the practice in this and other districts such claims have been almost universally disallowed. The clerk informs me that in two cases in this district an attorney was allowed his charges from the estate with the written assent of the assignee, but as these are the only instances, among some hundreds of voluntary petitions, and no decision was rendered upon the question, I do not think they ought to be regarded as precedents.

Whatever doubts, however, might have existed prior to the adoption of the new rules, with respect to such allowance, I think the practice is now put at rest by General Order No. 30, which expressly states that "no allowance shall be made against the estate of the bankrupt for fees of attorneys, solicitors, or counsel, except when necessarily employed by the assignee, when the same may be allowed as disbursements." This rule is very broad, apparently embracing involuntary as well as voluntary cases, and I think should be applied to cases pending at the time of its adoption as well as claims thereafter accruing. (*Meigs v. Parke*, 1 Morris, Iowa, 378; *Ellis v. Whittier*, 37 Me., 548; *Billings v. Segar*, 11 Mass., 340; *McMasters v. Vernon*, 4 Duer, 625.) I am compelled, therefore, to disallow the claim for attorney's fees, although it is conceded in this case to be reasonable in amount.

I think, however, the court may make an order for the reimbursement of the amount paid to the Marshal for his fees in giving the notices required by law (*Bump*, 226), and it is so ordered.

Comment In re James Thompson, J. R. A. f. 10

DISTRICT COURT OF THE UNITED STATES—MASSACHUSETTS.

Where B. petitioned for an adjudication in bankruptcy against himself and his late copartner A., and it appeared that upon the recent dissolution of the firm B. had agreed to pay the joint debts and had given bond to A., with a solvent surety to secure him against his liability for those debts; *held*, the petition should be dismissed as against A.

Upon such a petition it is not enough to prove that the joint assets are insufficient to pay the joint liabilities; the firm and its members must be shown to be insolvent.

In re Bennett et al.

Whether the court has any discretion to refuse an adjudication of bankruptcy because the petition has been concerted or brought for collateral purposes, *quære?*

But where a former partner and his surety for joint debts concerted the petition against the retiring partner, the court held them bound to make out a clear case.

In re BENNETT et al.

BENNETT petitioned for adjudication against himself and his late partner, Amos. It appeared in evidence that the firm was dissolved in December, 1874, and Bennett received a conveyance of all Amos' interest in the joint property, and undertook to pay all the joint debts; and gave a bond to Amos with one Haynes as surety, conditioned to pay all said debts and to save Amos harmless therefrom.

There was evidence tending to show that the plaintiff and defendant had kept an eating-house together for about a month, and had not agreed in the management of the business, and had separated upon the terms above-mentioned, and that debts for furnishing and supplying the rooms were still outstanding to the amount of two thousand dollars or more. Amos testified that he was solvent. It was admitted that Haynes, the surety, was abundantly able to respond.

W. W. Blackmar & H. N. Sheldon, for the petitioner.

J. T. Drew & A. Russ, for the respondent.

LOWELL, J.—I ruled in *Stower's case*, 1 Lowell, 528, that a partner would not necessarily be estopped from filing a petition in bankruptcy against the firm, by the mere fact that upon a recent dissolution of the partnership he had undertaken to pay all the just debts. The point is a nice one, but does not need to be reviewed at present.

In this case the evidence decidedly predominates in favor of Amos' solvency. It is very doubtful whether the definition of insolvency which applies to traders in matters connected with preferences, namely, a present inability to pay the debts as they mature, has relation to a case of this kind; because the retired partner is not necessarily insolvent in not paying debts for which he had received an indemnity, and which, as

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between these parties, the petitioner was bound to pay. The usual course of business is changed by the dissolution of the firm. Section 36 does not expressly provide when and under what circumstances two partners may be adjudged bankrupt, on the petition of one of them, but by necessary intendment refers us to Section 11, which requires a debtor to set forth in his petition that he is unable to pay his debts in full, not that he is unable to do so when and as they mature. And accordingly the form of a petition by copartners, as prescribed by the Supreme Court, avers that the members of the copartnership owe debts which they are unable to pay in full ; and the petition in this case follows that precedent.

Now I do not doubt that for many purposes under the Bankrupt Act a firm may be considered insolvent when its joint assets will not enable it to pay its joint debts as they mature. But I do very much doubt whether a partner of undoubted solvency can be made bankrupt at the suit of his copartner, by evidence that the firm is insolvent in that sense. If, being insolvent, there has been a joint act of bankruptcy, the creditors may proceed against both ; but in that case the solvent partner would have an opportunity to clear himself by paying all the debts ; but he cannot safely pay them to his insolvent copartner.

In *Thompson v. Thompson*, 4 Cush., 127, which is a leading case upon the above-mentioned definition of insolvency, the remarks of the court seem to take for granted, that if the firm cannot pay its debts as they mature, either partner may petition. But the point was not decided in that case, and it has since been held otherwise by the same court. (*Pierce v. Stockwell*, 11 Cush., 236 ; *Hanson v. Paige*, 3 Gray, 239.) In the latter case, THOMAS, J., in delivering the judgment and dealing with the objection that it was not alleged in the petition that the partners in their individual capacity were insolvent, says : " We cannot doubt that there must be a substantial averment of this fact ; for if one of the partners were solvent such solvent partner would have the legal right of settling the affairs

In re Bennett et al.

of the partnership * * * * Again ; as each partner is liable *in solido* for the debts of the company, a partnership cannot with strictness be said to be insolvent while any of the partners are able to pay its debts." (see p. 242.)

In this case there is no evidence that the firm is insolvent in any sense excepting that certain of its debts are outstanding and overdue. The evidence seems to prove that the bankruptcy was contrived between Bennett and the surety on the bond, and was intended to work in some way for the benefit of the latter. Whether he could escape his liability in this way, I do not say ; but he seems to have been advised that he could ; and the creditors appear to be content to act on the responsibility of Amos, fortified as it is with the bond and the admitted ability of the surety. Several of them have so testified. This bond seems, of itself, to make Amos solvent, since he is not proved to owe any considerable amount of separate debts. And it would work a delay and injury to the creditors, though they might not suffer eventual loss, to complicate the matter by proceedings in bankruptcy.

The English law had formerly a great deal to say about concerted bankruptcies, and a great many adjudications were set aside by the Lord Chancellor and afterwards by the courts of bankruptcy, because they were obtained from bad motives, and to work some collateral result other than the interest of the creditors. I doubt if our law, or indeed the latest statute in England, leaves any such discretion to the courts. Under our statute there would seldom be occasion for the exercise of such a discretion, and I have seen no statute or decision which gives or claims it in express terms, though there are some intimations one way and the other. I am not at present satisfied that it exists. But when it is made to appear that the interests of creditors will not be served by bankruptcy, and that they do not press the case, but it is brought forward by one partner for ends of his own, it becomes the court to require the petitioning partner to make out his case fully and clearly. I am not satisfied that the petitioner, Bennett, has made out the insolvency of his

In re Marter.

late partner, Amos, the defendant, under any test which can be applied to such a case.

Adjudication against Bennett only.

Petition discharged as to Amos.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where a general assignee for the benefit of creditors had been enjoined from disposing of the property of *the bankrupt*, and after service of the injunction had made a sale of the assigned property, a motion for an attachment for contempt was denied.

1. Because, under the case of *Perry v. Langley*, general assignment for the benefit of creditors is held in this circuit, not to be necessarily in fraud of the Bankrupt Act.
2. Because the District Court had no power to determine the validity of the assignee's title by summary proceedings.

The fact that a bankrupt is adjudicated upon a petition charging him with making a fraudulent conveyance, does not estop his grantee from claiming that as to him the conveyance is valid.

An assignment for the benefit of creditors is not fraudulent, because it states the assignee's desire to distribute his estate "without the sacrifice of property incidental to judicial and official sales, and without the expenses attendant upon winding up an estate in bankruptcy."

In re CHARLES J. MARTER.

MOTION for attachment for contempt.

Marter was duly adjudicated a bankrupt on the 3d day of May, and a writ of injunction was issued, prohibiting him and one Moses Beckel from encumbering, disposing of, or in any manner interfering with the property of said bankrupt or any part thereof.

Petitioning creditors now come in and move for an attachment for contempt against Beckel, upon affidavit that Marter had made a general assignment to Beckel prior to the adjudication, and that Beckel, since the service of the injunction upon him, had sold the goods assigned to one Lichtenberg; that Lichtenberg had sold them to the wife of the bankrupt, and that the bankrupt, who was then acting as clerk for his wife, was the real owner of the goods. A further affidavit is filed, showing that the wife of the bankrupt executed to Lichtenberg a chattel mortgage on the goods for four hundred and twenty dollars.

In re Marter.

The counter-affidavit of Beckel does not set forth a different state of facts, but states that the sale to Lichtenberg was made for cash, after public notice of the sale; that it was made in strict accordance with the trusts of the assignment; that before the sale he was advised and believed that the sale was no violation of the injunction, and that it was made with the advice and consent of a majority of the creditors of the said bankrupt. He also shows, for additional cause, that, after the commencement of the proceedings in this case, he held such property adversely to such proceedings, and claimed, and now claims, title thereto, as against any assignee which may be appointed in this case; but that, since the commencement of these proceedings, in obedience to the injunction, he has carefully desisted and refrained from any interference with any of the property of the said bankrupt, not covered by the assignment.

Mr. Alfred Russell, for the motion.

Mr. Don. M. Dickinson, for the respondent, Beckel.

BROWN, J.—It is claimed by the counsel for the petitioning creditors that, admitting the assignment to be valid at common law, yet as it was a general assignment in trust for creditors, it is, within the meaning of the Bankrupt Act, a conveyance with intent to injure, delay, and defraud creditors, or at least to defeat the operation of the Act, and is therefore void as against proceedings in bankruptcy. A large number of authorities are cited in support of this proposition. (*In re Smith*, 3 N. B. R., 377; s. c., 4 Ben., 1; *Ex parte Burt*, 1 Dill., 439; *Spicer v. Ward*, 3 N. B. R., 512; *Grow v. Ballard*, 2 N. B. R., 254; *In re Randall and Sutherland*, 3 N. B. R., 165; s. c., Deady, 557; *In re Goldschmidt*, 3 N. B. R., 165; s. c. 3 Ben., 379.)

A different view, however, was taken by Judge Hall, *In re Wells*, 1 N. B. R., 171; and by Judge Treat, of the Eastern District of Missouri, *In re Kintzing*, 3 N. B. R., 217.

Whatever may be my own views with regard to this question, I feel compelled to follow the decision of Mr. Justice Swayne, in the case of *Perry v. Langley*, 2 N. B. R., 596,

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in which he held, reversing the decision of the District Court for the Southern District of Ohio, that where a debtor makes an assignment of his property for the benefit of all his creditors, with intent to secure an equal distribution of all the debtor's property among his creditors, it is not necessarily a conveyance of the property with intent to defeat or delay the operation of the Bankrupt Act. This opinion was afterwards reviewed and affirmed by him in the case of *Farrin v. Crawford*, 2 N. B. R., 602 ; and I must hold it to be the law of this court until reversed by the Supreme Court, or by the learned Justice himself.

The fact that Marter was duly adjudicated a bankrupt upon a petition charging him with making this assignment with intent to defraud, does not preclude Beckel from disputing that fact. The adjudication works an estoppel as to Marter, or other persons not parties, only so far as it fixes the *status* of the bankrupt. Indeed the conveyance may be an act of bankruptcy, under Section 5021, and yet valid as to the grantee, under Sections 5128 and 5129. (*In re Williams*, 3 N. B. R., 286 ; *In re Drummond*, 1 N. B. R., 231 ; *In re Schick*, 1 N. B. R., 177 ; *In re Dibblee*, 2 N. B. R., 617 ; *In re Goodfellow*, 3 N. B. R., 452 ; *In re Dunkle*, 7 N. B. R., 72 ; *In re Hunt*, 2 N. B. R., 539 ; *In re Beck*, 1 N. B. R., 588.

Although there are certain suspicious circumstances set forth in the affidavit in support of this motion, I see no intent upon the face of the assignment to hinder, delay, or defraud creditors. It is true the assignor states his desire to distribute his estate "without the sacrifice of property incidental to judicial and official sales, and without the expenses attendant upon winding up an estate in bankruptcy ;" but he precedes this by saying : "it is expressly intended by this instrument to secure an equal distribution of the assets of the said party of the first part among all his creditors, and in no manner or way impede or delay the operation of the Bankrupt Act now in force, but give to the creditors the same benefits which might be derived under said act, in the true spirit of said act."

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It being established, by the opinion above cited, that a general assignment is not necessarily in fraud of the Bankrupt Act, I see nothing in these words to indicate that this assignment was fraudulent; on the whole his desire to save a sacrifice of his property is rather praiseworthy than otherwise.

But, again, a still more serious question arises as to the power of this court to enforce a claim of this character by summary proceeding. If the assignment was valid it transferred the title of the property to Beckel, and his sale of it was no violation of an injunction restraining him from disposing of the *bankrupt's* property. It is only upon the theory that the assignment is void as against creditors, and that the property still belongs to the bankrupt, that Beckel has been guilty of contempt. We are asked then to determine, summarily, upon petition and affidavits, that this assignment was void and passed no title to the property. The right of the assignee in bankruptcy to the property or its proceeds, turns entirely upon the validity of this assignment, which, as we have already said, is valid upon its face. So far as this question is concerned, the case stands precisely as if an assignee had been appointed, and he had petitioned that Beckel should pay the proceeds of the property to him, or should turn over the property itself, in case he had not sold it. Clearly Beckel holds adversely to the proceedings in bankruptcy, and to any title which the assignee hereinafter to be appointed may take.

Whatever doubt may have existed in the minds of the profession in the early days of the Bankrupt Law, with respect to the power of the District Court to proceed summarily against persons claiming titles to property adverse to that of the assignee, I regard it as settled by the Supreme Court, in the case of *Smith v. Mason*, 6 N. B. R., 1; s. c., 14 Wall., 419, that such proceedings cannot be taken except by a suit at law or in equity, as provided by Section 4979 of the Revised Statutes. In this case the bankrupt had placed in the hands of an attorney, for collection, certain claims against the Government, upon

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which he had collected a large amount of money. Prior to his bankruptcy, the firm of which the bankrupt was a member had made an assignment of the claim to Biddle & Co., as collateral security. Biddle & Co. also assigned their interest in the claim to one Smith as collateral security for their indebtedness to him. The assignee filed his petition summarily, setting forth that these several debts to Biddle and Smith had been paid, and prayed that the attorney might be restrained from paying out the money, and that he might be required to give bond for its safe keeping and its production in court when ordered. Subsequently he filed another petition against Smith, who, he alleged, claimed an interest in the fund, and prayed that he might be required to show cause why the fund should not be paid to him. "Beyond all doubt, therefore, the case is one where the appellant claimed absolute title to and dominion over the matter in controversy between him and the assignee of the bankrupt's estate." The court was of the opinion that such cases could not be commenced by a petition for a rule to show cause as in this case, nor be determined in a summary way by the District Court sitting in bankruptcy, without due process of law. If the assignee in bankruptcy would divest him of the possession and control of the fund he must do it by a suit at law or in equity, as provided in the third clause of the 2d section. "Strangers to the proceedings in bankruptcy, not served with process, who have not voluntarily appeared and become parties to such a litigation, cannot be compelled to come into court under a petition for a rule to show cause."

The question again came before the court, in the case of *Marshall v. Knox*, 8 N. B. R., 97; s. c., 16 Wall., 551. In this case certain property of the bankrupt had been distrained for rent under the laws of Louisiana, and was in the hands of the sheriff at the time of the adjudication. The assignee obtained from the court a rule upon the lessor and the sheriff, to show cause why they should not deliver up the property to the assignees, alleging that various creditors of the bankrupt claimed a privilege on the property and that it was necessary for the

In re Marter.

proper adjustment of all liens that the possession should be surrendered to the assignee. The landlord claimed the right thus to hold possession of the property until his claim for rent was satisfied. This claim was adverse to that of the assignee. The court held that this case did not substantially differ from that of *Smith v. Mason*, and that the District Court proceeded without jurisdiction in compelling the lessor and the sheriff to deliver up possession of the goods in question to the assignee.

Prior to these decisions there had been a great conflict of authority upon this point. The rule here laid down had been substantially adopted, in *Irving v. Hughes*, 2 N. B. R., 62; *In re Kerosene Oil Co.*, 3 N. B. R., 125; s. c., 6 Blatch., 521; *In re Bonesteel*, 3 N. B. R., 517; s. c., 7 Blatch., 175; *Bars-tow v. Peckham*, 5 N. B. R., 72; *Knight v. Cheney*, 5 N. B. R., 305; *Rogers v. Windsor*, 6 N. B. R., 246; *In re Ballou*, 3 N. B. R., 717; s. c., 4 Ben., 135.

I am aware that a contrary view was taken by Mr. Justice Swayne in *Bill v. Beckwith*, 2 N. B. R., 241; followed by the late judge of this district in *Norris' case*, 4 N. B. R., 35; s. c., 1 Abb. C. C., 514; but I think these cases must be regarded as overruled by the Supreme Court in the two cases above mentioned.

In *Creditors v. Cozzens and Hall*, 3 N. B. R., 281, an attachment for contempt in disobeying an injunction was refused in a case very similar to the one at bar, on the ground that a separate petition must be filed so that the proceedings upon the injunction need not be complicated with those praying the adjudication of bankruptcy.

The rule adopted in this and the other cases above cited is but the enunciation of a general principle applicable to equity proceedings, that an injunction will not be granted against persons not parties to the suit (*Fellows v. Fellows*, 4 Johns., ch. 25; *Iveson v. Harris*, 7 Ves., 251; *Stevens v. Barringer*, 13 Wend., 639, unless they are mere agents of the defendant.

I think the facts set forth in the affidavits in this case throw a strong suspicion upon the good faith of the assign-

In re Wallace & Newton.

ment, but the only remedy is by a plenary action at law or in equity against Beckel for the value or the proceeds of the property.

It results, therefore, that the motion must be denied.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Where there have been distinct firms of A & B and A & C, the three persons cannot be joined in one proceeding in bankruptcy, though the latter firm may have undertaken to pay the debts of the former.

In re WALLACE & NEWTON.

WALLACE & NEWTON petitioned to be adjudged bankrupts as partners, and that Bryant might be included in the decree, alleging that he had been a partner with Wallace, and that upon his retiring from the business, the petitioners, Wallace & Newton, had undertaken to pay the debts of the former firm of Wallace & Bryant. Bryant filed a written consent, and adjudication was made against the three. At the first meeting the creditors of Wallace & Newton voted for one assignee, and the creditors of Wallace & Bryant for another, and the Register certified to the court the question which vote was to control.

LOWELL, J.—At the hearing of the certified question, I felt bound to take exception to the power of the court to make a joint adjudication, and upon this I have heard counsel. The statute enacts or implies that two or more persons who are partners in trade, may be made bankrupt in one proceeding; and persons remain partners for this purpose until all their joint affairs have been fully wound up. It follows that if three or four or any number of persons have been partners, and owe joint debts, they may proceed jointly, although there may have been several lesser firms made up of some of the same persons: thus, the bankruptcy of A, B, C, & D, by a joint proceeding, will require the court to settle the affairs of the distinct firms of A & B, or B & C, and so on.

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But I know of no law which authorizes persons to join, or to be joined, in a petition in bankruptcy, who could not sue, or be sued together, in any form of action at law or in equity. Bankruptcy is an equitable proceeding, but no single bill in equity would lie to settle the affairs of distinct firms, composed in part of different persons.

It has been said that I intimated an opinion in favor of such a joinder in *Mitchell's Case*, 3 N. B. R., 441. This is a mistake. What I said was, that A & B, who were partners, could file a joint petition without joining C, who had been a partner with them both, under a distinct and different firm. I suggested, too, that, if C became bankrupt, I could probably consolidate the two proceedings, since all three persons had once been partners, and the affairs of that firm were not entirely settled.

It was formerly the law of England that a joint commission could not issue against part of the members of a firm; it must include all the partners, or else there must be separate proceedings against each. (*Ex parte Henderson*, 4 Ves., 163; *Ex parte Layton*, 6 Ves., 434.)

This was decided by analogy to suits upon a joint and several undertaking.

A statute was afterwards passed, permitting any number of partners to be joined. See 6 Geo. IV., ch. 6., Section 16. How this would be under our statute, I have not had occasion to consider. But I can find no authority by statute or decision, here or elsewhere, for taking a joint proceeding against persons who have never all been partners together.

The petition of Wallace & Newton was regular, and the adjudication against them is good, if Bryant is dismissed, which I understand is desired by the parties, if the entire decree cannot stand.

All proceedings against Henry J. Bryant dismissed.

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SUPREME COURT—RHODE ISLAND.

A discharge will bar a claim, although the residence of the creditor was incorrectly given on the schedule, and no notice was ever served on him, and he had no knowledge of the proceedings.

The notice that is required in order to give the District Court jurisdiction to grant a discharge is the notice prescribed by the statute on the application for it.

*GODFREY PATTISON & CO. v. OLIVER C.
WILBUR.*

ACTION of debt, in which the plaintiffs sought to recover of the defendant a sum of money, which they alleged to be due them by a judgment of this court for eight thousand one hundred and ninety-one dollars and eighty-five cents and costs, rendered on the twenty-fifth day of September, A.D. 1860. The defendant pleaded a discharge in bankruptcy, granted to him by the District Court for the district of Rhode Island on the twenty-seventh day of May, A.D. 1868, before the commencement of this action.

The plaintiffs replied that the defendant did not annex to his petition in bankruptcy, upon which said discharge was rendered, a statement containing the place of residence of the plaintiffs, nor any statement that such place of residence was unknown to him, but that he did set forth in the schedule annexed to his petition a statement that the place of residence of the plaintiffs was in the City of New York, whereas, in truth and in fact, their place of residence then was, and for a long time had been, in Glasgow in Scotland; and, further, that no written or printed notice that a warrant in bankruptcy had been issued against the estate of the defendant was served by mail, or personally, upon the plaintiffs, or either of them, nor did the said plaintiffs, or either of them, have any knowledge of any of the proceedings in bankruptcy relating to the said defendant, or of his discharge therein; to which replication the defendant demurred generally.

T. A. Jenckes & Gardner, for the defendant, in support of

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the demurrer. 1. Such impeachment of a discharge could in no event be made by a State Court. Bankrupt Act, Section 34; *Corey et al. v. Ripley*, 4 N. B. R., 503; *Ocean National Bank v. Olcott*, 46 N. Y., 12.

2. Strict accuracy in the preparation of schedules of creditors is not enjoined by Section 11 of the Bankrupt Act, and a discharge will nowhere be impeached for omissions and mistakes therein where fraud is not alleged. *Payne & Brother v. Able and others*, 4 N. B. R., 220; *Symonds v. Barnes*, 6 N. B. R., 377; *Humble & Co. v. Carson*, 6 N. B. R., 84; *In re Stetson*, 3 N. B. R., 726; *Batchelder v. Low*, 8 N. B. R., 571; s. c., 43 Vt., 662.

Hayes, for the plaintiff, *contra*. 1. The alleged discharge of the defendant in bankruptcy, under the circumstances set forth in the replication, and admitted by the demurrer, is no bar to the present action. The Bankrupt Court had no jurisdiction over the creditors, the plaintiffs in this case. (a.) To give a court jurisdiction, the defendant, or person sought to be affected by any action or proceeding therein, must have had notice of it. The notice may be actual or constructive. The service must be such that it can be proved or be legally presumed. But this notice, to be valid, and confer jurisdiction over the thing seized or attached, must be according to law and the admiralty rules. Nailing a monition to the door of a grocery or of a school-house, instead of upon the mast, would not enable an admiralty court to take jurisdiction of a vessel. *Barnes v. Moore*, 2 N. B. R., 573; *Anon.*, N. B. R., Sup., 27; *Benedict's Admiralty*, 2d edition, Section 365.

No person is required to answer in a suit in which process has not been served, or whose property has not been attached. *Boswell's Lessee v. Otis*, 9 How., 336; *Biscoff v. Wethered*, 9 Wall., 812; *Webster v. Reid*, 11 How., 437.

A judgment obtained without notice is null and void. *Anderson v. Miller*, 4 Blackf., 417; *Enos v. Smith*, 7 S. & M., 85; *Woods, ex parte*, 3 Pike, 532; *Evarts v. Gove*, 10 Vt., 161;

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Eglheard v. Sutton, 7 How., Miss., 99; *Clarke v. Grayson*, 2 Pike, 149.

(b.) If the mode of notice to the creditor be prescribed by statute, it must be strictly followed. Otherwise the court has no jurisdiction over him. *Anon.*, N. B. R., Sup., 27; *Barnes v. Moore*, 2 N. B. R., 573.

The 11th Section of the Bankrupt Act of 1867 provides in what manner jurisdiction over the creditor may be obtained, viz., by the service of a process or warrant in two ways: first, by publication of notices in the newspapers; second, by serving written or printed notices, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition, by the debtor.

In addition, such personal or "other notice must be given to any persons concerned" as the warrant specifies.

For the purpose of giving such notice by the marshal, the debtor is required by the same section to annex to his petition a schedule in which he shall state "*the place of residence of each creditor, if known to the debtor, and, if not known, the fact to be so stated.*" *In re Pulver*, N. B. R., 46; s. c., 1 Ben., 381.

The last requirement was evidently for the purpose of enabling the Judge or Register to "direct other notice to any person concerned," in the manner he might deem proper.

The notice must be served on foreign creditors as well as those who reside in the United States. *In re Heys*, N. B. R., 21; s. c., 1 Ben., 333.

It is admitted in this case that the plaintiffs, who were creditors of Wilbur, resided at the time of filing his petition, and for a long time before, in Glasgow in Scotland; that their said place of residence was not set forth in the debtor's schedule annexed to his petition; that he did not set forth that their place of residence was unknown to him; that no written or printed notice, as required, was served by mail or personally on the plaintiffs, or either of them; and that neither of them had any notice of any of the proceedings in bankruptcy relating to Wilbur, or of his discharge therein.

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(c.) There can be no valid judgment against a person not within the jurisdiction of the court rendering it. The court must have jurisdiction not only of the cause, but of the parties. *Thompson v. Tolmie*, 2 Pet., 157; *United States v. Arredondo*, 6 *Ibid.* 691; *Voorhies v. Bank of United States*, 10 *Ibid.*, 449; *Wilcox v. Jackson*, 13 *Ibid.*, 498; Story on the Conflict of Laws, Section 586; *In re Penn et al.*, 3 N. B. R., 582; *Bissell v. Briggs*, 9 Mass., 462; *Gleason v. Dodd*, 4 Met., 333.

(d.) A discharge in bankruptcy is a judicial determination of the highest character. Ordinarily, judgments and decrees affecting property relate to the enforcement of existing obligations, or to the protection of existing rights. A discharge in bankruptcy not only impairs the obligation of contracts, but annuls all contracts and obligations within the purview of the bankrupt law.

The commencement of proceedings in bankruptcy on the part of the debtor is the commencement of a suit in the District Court by him against his creditors, in which action he is plaintiff and the creditors defendant, the debtor asking the court for a judgment against the defendants, discharging him from his indebtedness to them. *In re Adams*, 2 N. B. R., 272; s. c., 36 How. Pr., 270.

If a defendant in an ordinary action should have notice that a plaintiff is seeking a judicial affirmation of an existing obligation, *a fortiori* should a party interested in such an obligation have notice that another is seeking to have it judicially annulled.

Second. Nothing in the 34th Section of the bankrupt act restricts other courts than the Bankrupt Court from inquiring into the jurisdiction of the latter in respect to a debtor's discharge in bankruptcy, or from adjudging the discharge invalid, if it is proved that the court had no jurisdiction.

1. It was not intended by any of the provisions of the bankrupt act that the Bankrupt Court should pass, in plenary manner, upon the question whether a particular

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claim will or will not be released by a discharge. *In re* J. H. Kimball, 2 N. B. R., 204; s. c., 2 Ben., 554; *In re* Rosenberg, 2 N. B. R., 238; *In re* J. S. Wright, 2 N. B. R., 142.

2. The 34th Section provides that a discharge, duly granted, may be pleaded in bar; and the certificate of discharge shall be conclusive evidence of the fact and regularity of the discharge. But a discharge granted without jurisdiction is not duly granted, and is no discharge. *In re* Penn *et al.*, 3 N. B. R., 582; *In re* Goodfellow, 3 N. B. R., 452; *Barnes v. Moore*, 2 N. B. R. 573.

3. The proviso to the 34th Section was not intended to apply to a case where the question of the jurisdiction of the Bankrupt Court is raised. At most, it limits the right of a creditor to contest the validity of a discharge in three respects—first, he must show that the discharge was fraudulently obtained; secondly, he must do so within two years; and, thirdly, he must do it in the court which granted the discharge.

To show that the discharge was fraudulently obtained, he must confine himself to some one or more of the several acts contained in the 29th Section. But there is nothing in the 29th Section that relates to the *question of jurisdiction*.

4. A construction of the bankrupt act that a creditor was bound by a discharge in a proceeding of which he had no notice nor knowledge, and was limited to two years from the date of the discharge to show that it was invalid, and then only in the court which gave it, might lead to some startling results.

If one creditor, who had no legal notice of the bankrupt proceedings of his debtor, is bound by the results, so would be two, twenty, or, indeed, all of the creditors, if they had no such notice. And, if none of the creditors learned of the discharge for two years after it was granted, they could have no redress in any tribunal whatever.

Third. A careful examination of the opinions of courts,

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cited to maintain the propositions that the validity of a discharge, for want of jurisdiction of the court granting it, cannot be questioned except in that court, and within the time limited in the proviso to the 34th Section of the bankrupt act, shows that such a deduction is unfounded.

Fourth. The idea that a voluntary proceeding in bankruptcy is in the nature of a proceeding *in rem* is an absurdity. It does not have one of the characteristics of the latter proceeding. Where there is no *res* there can be no attachment nor seizure, and hence no notice nor jurisdiction. Benedict's Admiralty, 2d ed., 365; *Barnes v. Moore*, 2 N. B. R., 573.

Aliter, what necessity or reason for the notices prescribed in Section 11 of the Bankrupt Act.

Fifth. The decisions of different courts upon the question of the omission of a creditor's name, or want of notice under the bankrupt act of 1841, are entitled to no weight in the consideration of the Act of 1867, because the two acts are wholly different.

POTTER, J.—This is an action of debt on judgment, and the defendant pleads a discharge in bankruptcy granted in this Rhode Island District.

The plaintiffs reply that although the plaintiffs' names were given as creditors in the list annexed to the petition in bankruptcy, their residence was not stated; nor was it stated that the residence was unknown to the petitioner; but he did state New York City as their residence, whereas they were residents of Glasgow, Scotland, and that no written or printed notice was served personally or by mail on the plaintiffs, nor did the plaintiffs know of the proceedings; to which replication the defendant demurs.

The plaintiffs claim that, to give a court jurisdiction, the defendant or person affected must have actual or constructive notice, and that, if the notice be prescribed by statute, it must be strictly followed; and that otherwise the judgment will be void. And for the mode of notice in this case they

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refer to Section 11 of the Bankrupt Act of 1867, which required publication in the newspapers, and serving written or printed notices by mail or personally ; and, to carry this out, the petitioner is required to file a schedule of his creditors, with their residences, if known, and if not known, the fact to be so stated.

If this were the only notice provided for in the act, it has not been complied with. But we have been referred by the defendant's counsel, Mr. Gardner, to authorities holding that the discharge cannot be impeached for any omission unaccompanied with fraud. But it does not seem necessary for us to express any opinion on that in the present case. It is contended by Mr. Jenckes, for the defendant, that the bankrupt act has two objects—first, the application of a bankrupt's property to the payment of his debts, which is the main object of the law ; second, the discharge of the honest debtor. But this second object has no necessary connection with the first, and may not be applied for, or may be granted or refused, without at all affecting the validity of the proceedings to effect the first object.

Sections 11-29 relate entirely to the distribution of the bankrupt's property, and have nothing to do with his discharge ; and the notice required by Section 11 is for this purpose only, to enable creditors to prove their claims, and has no reference whatever to his discharge.

The court, having jurisdiction over the bankrupt's person, and over his property, proceeds to apply it to payment of his debts ; and it is important to consider that in this first part of the proceedings the notice is the same in case of voluntary and involuntary bankruptcy. But if the debtor chooses to apply for a discharge, he then becomes the moving party, even if the proceedings were originally commenced by creditors ; and Section 29 prescribes the notice to be given—namely, by mail, to all who have proved their debts, and by publication also, to appear and oppose the discharge. And the order of court (Form, No. 51), according to the rules prescribed by the Supreme Court of the United States, under

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the authority given them by the act, is that notice be published in newspapers; "that all creditors who have proved their debts, and all others in interest, may appear at the said time and place, and show cause, if any they have," etc., etc.; and also for letters by mail to creditors whose residence is known.

We think this the sound view, and that the notice to be given in the matter now in question is the notice prescribed by Section 29, and not the one provided for by Section 11.

To give a court jurisdiction, either the property must be within its control, or the party must have his domicile, or be at least temporarily within its control.

In case of real property, the *lex rei sitæ* of course prevails. In regard to personal property, while there is some diversity of opinion as to the effect of a bankrupt's assignment upon foreign property, there is none, we believe, in English or American cases, as to the effect upon property situated within the jurisdiction.

In the present case, both parties lived in this country when the contract was made. Here was its place of performance, the real *locus contractus*. 4 Phillimore, 2d ed. Section 1670, etc.; Lawrence's Wheaton on International Law, pp. 178, 284, 290; Wharton's Conflict of Laws, Sections 523, 852, *a*. And, although the plaintiffs subsequently removed to a foreign country, they have sued that claim in the courts of this country, and obtained a judgment on it, in which, of course, their former claim is merged. And on that judgment the present suit is founded. And the plaintiffs, by suing in our court, subject themselves to the *lex fori*, and cannot deny here the legal effect of the discharge under our laws. Upon no other principle would a foreign plaintiff suing in our courts be bound by a judgment against him, which we believe has never been doubted. *Penniman v. Meigs*, 9 Johns., 325; *Murray v. De Rotterham*, 6 John. Ch., 52; *In re Zarega*, 4 Law Reporter, p. 480 (A. D. 1842).

There being no dispute but that the notice required by Section 29 was given, the demurrer must be overruled.

In re Bechet.

UNITED STATES DISTRICT COURT—LOUISIANA.

The composition is a compromise of a debtor with his creditors, carried on under the regulations of law, and under the supervision of the court. It absolutely discharges the debts of those creditors whose names, addresses, and debts are placed in the statement produced at the meeting of creditors, and no other discharge is needed.

Debts of those creditors whose names are not on the statement are not discharged, and the court would not be authorized to grant a discharge as to them.

. In re ALPHONSE BECHET.

A CREDITOR of the bankrupt applied to the Circuit Judge, during a vacancy in the office of District Judge, for further time to file specifications of his grounds of opposition to the discharge of the bankrupt. The application was resisted by solicitors for the bankrupt, on the ground that the bankrupt had proposed a compromise to his creditors, which had been accepted at a meeting of the creditors, and approved by the court in compliance with the provisions of the Act of June 22, 1874.

J. Ward Gurley, for the motion.

Thomas P. Clinton, contra.

WOODS, C. J.—This motion for further time to state grounds of objection to the bankrupt's discharge, as well as the application for the discharge itself, seems to be founded on a misconception of the effect of a composition under the Act of June 22, 1874.

When a proposition for composition has been made and accepted by a meeting of creditors, and approved by the court, and the terms complied with by the debtor, he is discharged from the claims of all creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting of creditors at which the resolution accepting the composition was passed; no other discharge is necessary, for, in the language of the act, the provision of the composition shall be binding on such creditors.

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No general discharge can be granted, for the composition does not affect or prejudice the rights of other creditors.

This settlement by composition of the affairs of the debtor in whose case proceedings in bankruptcy have been commenced does not contemplate a discharge under the act. The composition may be offered, accepted, and approved, even without an adjudication in bankruptcy, for the act provides that in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the composition may be offered and accepted.

The act also provides that, under certain circumstances, "the court may refuse to accept or confirm said composition, or may set the same aside, and in either case the debtor shall be proceeded with as a bankrupt, in conformity with the provisions of law."

These provisions of the law show that the composition is a substitute for the ordinary proceedings and discharge under the Bankrupt Act.

The composition is a compromise of a debtor with his creditors, carried on under the regulations of law and under the supervision and sanction of the court. It absolutely discharges the debts of those creditors whose names, addresses, and debts are placed in the statement produced at the meeting of creditors, and no other discharge is needed.

The debts of those creditors whose names are not on the statement are not discharged, and the court would not be authorized to grant a discharge as to them.

These views are confirmed by the case *R. Haskell*, 11 N. B. R., 164, decided by Judge Lowell, where it is held that the mere fact that the bankrupt, if opposed, would be unable to obtain his discharge, will not necessarily prevent the court from allowing a resolution of composition.

In my judgment, the application of the bankrupt for his discharge is unnecessary and improper, and the motion for time to state grounds in opposition to it is, therefore, ill-advised and improper, and should be overruled.

In re Coan & Ten Broeke Carriage Manufacturing Co.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

A consignor, whose property was sold prior to the bankruptcy, and the proceeds mingled with the general assets, has no lien or specific claim against the estate. He can only share with the other creditors.

*In re COAN & TEN BROEKE CARRIAGE
MANUFACTURING CO.*

THIS was a petition by B. Manville & Co., and other creditors of the bankrupt, seeking to establish a trust fund, and asking payment in full of their claims from the money in the hands of the assignee.

The bankrupt, a corporation doing business in the City of Chicago, as a manufacturer and dealer in carriages, was in the habit of receiving carriages on consignment from other manufacturers and dealers; keeping an open account with each one of them; selling for cash and on credit, or exchanging for material, and sometimes also paying in material. At the time of the bankruptcy, they were indebted to some of the petitioners for carriages thus sold, and among the stock coming to the hands of the assignee were other carriages thus sent on consignment, all of which, however, were sold by the assignee, there being nothing at the time to indicate that they were not the property of the bankrupt; and, the consignors having made no claim to any specific carriages, the proceeds of such as had been sold prior to the bankruptcy had not been kept as any special fund, but had gone into the general assets of the corporation.

F. C. Ingalls, for the petitioners.

BLODGETT, J.—The controlling question in this case is whether the proceeds of these consigned carriages came within the clause in the 14th Section of the Bankrupt Act, which provides that “no property held by the bankrupt in trust shall pass by such assignment.” It is true that in

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examining the text-books and cases on the subject of trusts we find many expressions like these, that a factor or agent is a trustee for his principal; that a bank is a trustee for its depositors; and even that a debtor is a trustee for his creditor. The courts of New York and Massachusetts have frequently decided cases upon these principles; and, founded upon such expression, the counsel for petitioners have framed their argument, that they have a lien upon these proceeds as a species of trust fund, and are entitled to payment, to the exclusion of the general creditors of the bankrupt.

A proper construction, however, of this clause in the Bankrupt Act will only apply it to property still held in specie, and which can be distinguished from the other property of the bankrupt, or where the proceeds constitute a separate and distinct fund—not to cases where they have become mingled with the general assets of the bankrupt, even by his wrongful act.

Here there is no consigned property in the hands of the assignee which the petitioners can claim as belonging to themselves, nor any distinct fund which can be recognized or traced as the specific proceeds of the property sent on consignment by these petitioners.

The petition must, therefore, be dismissed.

UNITED STATES CIRCUIT COURT—IOWA.

In estimating the number and value of creditors who must join in the petition in involuntary bankruptcy, under Section 39 of the Bankrupt Act, as amended by Section 12 of the Act of 1874, creditors who have been fraudulently preferred by the debtor are not to be counted.

In re M. C. ISRAEL.

THIS case was presented by a petition of M. C. Israel,

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asking the review and reversal of an order of the District Court of Iowa, at Keokuk, made on the 26th day of February, 1875, adjudicating him a bankrupt upon the petition of certain of his creditors. The petition of creditors in the Bankruptcy Court charges that Israel preferred certain creditors, contrary to the Bankrupt Law, by giving them mortgages and assigning accounts to them. Israel answered, simply denying that the petitioning creditors constituted one-fourth in number of his creditors, and that the aggregate of their debts provable under the Bankrupt Act amounted to one-third of the debts so provable, and, with his answer, filed a list of his creditors. To this answer the petitioning creditors filed a replication with a list of creditors, and alleging that the petitioning creditors constituted one-fourth in number of the creditors holding unsecured debts exceeding two hundred and fifty dollars, and further alleging that certain creditors in the list annexed to the debtor's answer were fully secured, and had received preferences contrary to the Bankrupt Act, knowing that a fraud on the act was intended, and insisting that such creditors should be excluded from that computation in making up the required one-third in amount. The replication, however, does not charge actual fraud. To the replication there was filed by Israel a demurrer raising two questions—first, that secured creditors should not be excluded from the computation; and, second, that the preferred creditors should not be excluded from the computation. The debtor Israel, by agreement, as shown in order of adjudication, also filed a rejoinder to part of the replication, stating that the secured creditors named in the reply were only secured to the amount of two thousand dollars, and not fully secured. To the rejoinder the petitioning creditors filed a demurrer.

The District Court overruled the demurrer of Israel to the replication of the petitioning creditors, and sustained the demurrer of petitioning creditors to the rejoinder of Israel, and adjudged Israel bankrupt. To reverse this order, Israel

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brings the case here by petition in review, under Section 2 of the Bankrupt Act.

Howell & Anderson, for petitioning creditors.

Gillmore & Anderson and *James Hagerman*, for the bankrupt.

DILLON, J.—One proposition of law applied to this case results in affirming the decree adjudicating the debtor a bankrupt. It was not denied that a sufficient *number* of the creditors joined in the proceeding. The contest was whether those who united in the petition and promoted the proceeding represented one-third *in value* of the debts over two hundred and fifty dollars provable in bankruptcy. By his answer the debtor alleged that they did not. The replication of the petitioning creditors to this answer alleged :

First. That *all* of the creditors named in the answer of the debtor, except the petitioning creditors, were *fully secured*.

Second. That *all* of said creditors, other than the petitioning creditors, had accepted, and still held, *preferences* contrary to the Bankrupt Act, and in fraud of its provisions. The debtor demurred to the whole replication, and the court below overruled it, and the defendant stood upon his demurrer, and did not rejoin to the second ground in the replication. The only rejoinder was to the first ground of the replication, and it was to the effect that their debts were not fully secured, but secured only to the extent of two thousand dollars. It stands admitted, therefore, on the record, that all of the creditors specified in the list furnished by the debtor, except the petitioning creditors, had received, and *still held*, fraudulent preferences. These represented more than two-thirds in value of the debts; and the question is, shall they be counted in determining whether the requisite number of creditors, as to value, had joined in the proceedings? On this point I have no doubt whatever. Such a construction as the debtor contends for would be directly in the face of Section 23, as well as hostile to the spirit and purpose of the

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Bankrupt Act. A leading object of that enactment is to enable the honest creditor, through the assignee, to defeat unlawful preferences.

Shall a debtor, by fraudulently preferring three-fourths and a fraction in number, or two-thirds and a fraction in value of his creditors, put it in their power to make the fraud effectual by refusing to commence bankruptcy proceedings, or, what results in the same thing, requiring them to be counted as creditors on the question whether bankruptcy proceedings shall be initiated. If the debtor is not thrown into bankruptcy, their preferences stand, and the law is evaded. If he is thrown into bankruptcy, they lose, or are liable to lose, their illegal advantage. Such a construction makes the act *felo de se*. It offers a premium to fraud, and would leave nothing of the Bankrupt Act worth saving.

The honest creditor, who refuses to violate the law and take a preference, would alone suffer, while the unscrupulous creditor would reap the harvest of his unlawful security. It would leave the unsecured creditors wholly at the mercy of those that have obtained illegal preferences.

This disposes of the case without determining the other question, whether creditors who hold *valid* securities shall be counted in whole or for the excess of debt over the security.

Without deciding this, I may add that the course of the argument, based upon Section 9 of the amended act, Sections 19-23 of the original act, and Forms 21 and 25, and Sections 39 and 43, as amended, rather impressed me with the opinion that a secured creditor is *prima facie*, at least as to the debt secured, not to be counted; but if he comes forward, and offers to surrender his security, he is then to be regarded as an unsecured creditor, possibly. But this is more doubtful. On proper proceedings, an inquiry may be had, at the instance of a secured creditor, to ascertain the excess of the debt over the security held therefor.

But I give no opinion on these questions, and reserve

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them until a *case arises* which shall make their determination necessary.

UNITED STATES CIRCUIT COURT—E. D. MISSOURI.

Section 11 of the amendatory Bankrupt Act of June 22, 1874, amending Section 35 of the original act by inserting "knowing," applies to cases brought after the time when the amendatory act took effect, although the instrument creating the alleged illegal preference was executed before June 22, 1874. -

The amendment above referred to, made by Section 11 of the amendatory act, works a substantial change in Section 35, and within the meaning of Section 11 of the amendatory act, "knowing" and "having reasonable cause to believe" that a fraud on the act was intended, are not legal equivalents.

B. SINGER, Assignee of TOWLE, Appellant, v. O. C. SLOAN et al., Appellee.

ON the 21st day of January, 1874, a petition in bankruptcy was filed against Towle, by some of his creditors, and the following 3d of February he was adjudged a bankrupt. The plaintiff, appellant herein, is his assignee. On the 18th day of December, 1873, said Towle and wife executed a deed of trust to the defendant, appellee herein, for the alleged antecedent indebtedness.

The bill was filed December 9, 1874, to have said deed set aside, as in contravention of the Bankrupt Act, on the ground that Towle at the date of the execution and delivery was insolvent, and that Sloan had reasonable cause to believe, etc. The defendant demurred to the bill, on the ground that it should allege in conformity with Section 11 of the amendatory act of June 22, 1874, that the defendant *knew* that a fraud on the act was intended. The demurrer was sustained and the bill was dismissed. The complainant appeals against the decree dismissing the bill.

A. Binswanger, for the complainant.

Geo. D. Reynolds, for the defendant.

DILLON, J.—This bill was filed after the amendatory

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Bankrupt Act of June 22, 1874, went into effect. It seeks to avoid as fraudulent under the Bankrupt Act, an instrument made by the bankrupt, December 18, 1873. The question presented by the demurrer to the bill requires a construction of Section 11 of the amendatory act. It is contended by the counsel for the assignee:

First. That Section 11 does not apply to any transaction which took place before June 22, 1874, but only to transactions subsequent to that time.

Second. That if it does not apply in cases brought after June 22, 1874, to transactions before, the insertion of the word "knowing" in Section 35 is verbal only, and wrought no change in the legal effect of that section; and hence the bill of complaint was good, although it did not charge that the defendant *knew* a fraud on the act was intended, but only charged that he had reasonable cause so to believe.

However it may be as to cases like the present, brought under Section 35, *pending* at the time the amended act of June 22 went into operation, I am very clear in the opinion that the provisions of Section 11, amending Section 35, apply to all cases of this character commenced after that time, although relating to transactions which occurred before.

I do not wish, however, to be understood as conceding that Section 11 does not apply to cases pending and undetermined when the amended act went into effect. It is unnecessary to examine that question, and I give no opinion upon it. It is to be borne in mind that this suit is one to enforce a right of action which was wholly given by statute, and to invalidate a security which was good on the general principles of law, and only bad because of an express provision of the statute.

If the change in Section 35, made by the new Section 11, is *remedial*, then the general rule is undoubtedly as expressed by Mr. Justice Miller, *In re King* (10 B. R. 566), that its provisions do apply to pending cases (and, *a fortiori*, to future cases), unless there is something to show that the Legislature intended to exclude them.

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And even if an action resting upon Section 35 be considered a *right*, as distinguished from a *remedy*, still the general rule is that rights wholly given by a statute, are taken away by its unconditional repeal, and particularly as to cases not commenced when the repealing statute took effect. Sedgwick Const. and St. Law, 129 *et seq.*

There is much in the known history of the amendatory act to fortify the legal presumption, above mentioned, as to the effect of repealing statutes.

The counsel for the assignee makes the further point that "having a reasonable cause to believe," and "knowing," are in contemplation of law identical, and the averment of the former is legally equivalent to the averment of the latter; in other words, that Congress by carefully requiring the word "knowing" to be three times inserted in Section 35, and by changing Section 39 in this respect to conform to the change made in Section 35, meant nothing, and accomplished nothing. I cannot agree to that view. The intention of Congress is to be sought, and this is best done by looking at the original Section 35 and the decisions construing it, and then at the amendment made by Congress.

The courts had generally, I think I may say universally, held that Section 35 was contravened, if the creditor or other person had reasonable cause to believe a fraud on the act was intended, although he did not know it; that the inquiry was not what he actually knew, but what he had reasonable ground to believe. Many of the cases on this point are cited in the opinion of the District Judge, and I need not refer to them at length.

Now, the main scope of the Act of June 22, is to relieve the severe features and rigorous operation of the original act, and the amendment of Section 35 was one of the changes of that character. Where reasonable cause to believe that a fraud on the act was intended, was before sufficient, *knowledge* of that fact is now required.

A change was made, undoubtedly, but how extensive that change is, or what is necessary to prove the requisite *knowl-*

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edge on the part of the defendant, are questions not arising on the record and not necessary to be determined.

UNITED STATES CIRCUIT COURT—E. D. WISCONSIN.

If the preferred creditor surrenders his preference before the entry of the judgment, but after the opinion is given, where the case is tried before the court, he may prove his debt where there is only constructive fraud.

If the preferred creditor waits until suit is instituted, he may be required to pay the expenses of the assignee before he is allowed to prove his debt.

In respect to the right to prove it makes no difference whether the transfer is constructively fraudulent under the Bankrupt Law, or under the statute of Elizabeth.

ELISHA S. BURR v. *OTIS B. HOPKINS*, Assignee of
R. D. TRAPHAGEN.

DRUMMOND, J.—Before the petition in bankruptcy in this case was filed the bankrupt had given a mortgage on some personal property to Burr. After the decree in bankruptcy and the appointment of the assignee the latter made application to Burr, who had taken possession of the property under the mortgage, to release it, on the ground that the mortgage was made in violation of the Bankrupt Law, and claiming that the property which it covered should be turned over to the assignee. This was declined by Burr, and thereupon the assignee brought a suit in this court to recover the value of the property. The case was heard in March, 1874, without the intervention of a jury, and the court found that the mortgage was contrary to the provisions of the Bankrupt Law. Before any judgment was rendered the defendant in that suit—the present plaintiff—paid the amount of the judgment and costs in the case, and the suit was afterwards dismissed without any judgment having been rendered. Under those circumstances the present plaintiff tendered proof of the original claim which the mortgage was given to secure. It consisted of several promissory notes. Upon application to

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the District Court the claim was disallowed, because the mortgage which was given to secure the notes had been executed in violation of the Bankrupt Law, and therefore the court held he was deprived of the right to prove the claim against the estate of the bankrupt. From the order of the District Court an appeal has been taken, and the question now before the court is, whether or not that order was correct. As the case was tried before me, I am acquainted with the particular circumstances connected with the case, and which gave rise to the questions of law upon which it was decided in the Circuit Court.

There was not, in fact, any actual fraud committed by the mortgagee. It was only a case of constructive fraud, and by no means free from difficulty, as was stated by the court at the time. The statute upon the subject declares that the party who has received benefit from the transfer of property, or by the execution of an instrument in violation of the provisions of the Bankrupt Law, shall not be entitled to prove his claim if he is a creditor, unless he surrenders the property.

The language is : " Any person who * * * * * has accepted any preference, having reasonable cause to believe that the same was made, or given by the debtor, contrary to any provisions of the act, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference." Original act, Section 23 ; Rev. Stat. U. S., Section 5084. It is under this section that Burr seeks to make the proof of claim against the estate of the bankrupt in this case. He says that he has surrendered all the property that he obtained by virtue of the mortgage, and the question is whether the circumstances which have been detailed are such as to bring him within the privilege conferred by this section of the Bankrupt Law. It is to be observed that no time is fixed by the statute when the surrender is to be made. The con-

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struction which has been given to this section is, that the surrender must be made before the assignee shall recover the property which has been wrongfully conveyed by the bankrupt. Now in this case there was a trial before the court, and the issue was found. There was no judgment rendered. Was there within the meaning of the law a technical recovery of the value of the property, so as to preclude the creditor from proving his claim against the estate? My view of the law is, that in the absence of any actual fraud committed by the person seeking to prove his claim, and where it may be fairly said there is a serious doubt upon a question of law, where, in other words, there is nothing but a constructive fraud, and the creditor has acted in good faith and under the conviction that he has a valid right to retain the property, that he may do so, and may even allow a suit to be prosecuted, and proof to be introduced against him, and not be deprived of the benefits conferred by the section referred to. It is often a very nice question, not only among lawyers, but among judges, whether, in a given case, a party is within the condemnation of the statute. There are some cases where it may be said there can be no real controversy, but in others there may be difficult questions to determine; and to say, if a party in good faith, believing that he has a valid claim on property, resists the right set up by the assignee, even after the commencement and prosecution of a suit, that thereby he is deprived of the right of proving his claim if the court shall find that he has committed a technical offense against the law, seems to me to be a rather hard rule. Where there is actual fraud there should be no hesitation under the provisions of the law, as they existed at the time this case was tried. But I am not prepared to say, because the party or his counsel has made a mistake as to his rights, if he has acted in good faith, and it is simply a question of constructive and not actual fraud, that he is to be deprived of the right to prove his claim. As soon as the opinion of the court was ascertained he at once submitted, and then surrendered all the property or its value.

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If he had allowed the case to go to judgment, possibly it might have been different. There have been numerous cases decided under this section of the statute. They are nearly all to be found as a note to Section 5084, on page 557 of the seventh edition of Bump's Bankruptcy, and it is sufficient to say that there is nothing in these decisions, taking them altogether, to prevent me from deciding this case according to what I conceive to be the true, equitable rule. I have seen no case which compels me to hold that this mortgagee is precluded from filing his claim against the estate. Again, I cannot be insensible to the view which Congress has since taken of the subject. In the amendment which is made to the Bankrupt Law, by the Act of June 22, 1874, Congress has gone, perhaps some persons might think, too far. And although this amendment was not in force at the time that this mortgage was made, or even at the time that the case was tried before the Circuit Court, still we may look into it for the purpose of seeing what Congress was inclined to do at the time this amendment was passed. It amended the 39th Section of the law in several important particulars, and among other amendments was this: "If such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred contrary to this act; *provided*, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in case of actual fraud on his part, be allowed to prove for more than a moiety of his debt." That may be thought to be going too far, in actual fraud—allowing a person to prove for one-half of his debt. However, while reversing the order of the District Court, I desire to provide for the protection of the estate. The estate should not be prejudiced by a prosecution which could not be successfully maintained, as the result proved. The money was all paid, the costs were also paid, and the only thing that remains is any other expense to which the estate has been

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subjected by the prosecution of the suit in the Circuit Court, so I shall remit the case to the District Court, with instructions to allow the mortgagee, Mr. Burr, to prove his claim, upon the payment to the assignee of a reasonable compensation for the counsel who prosecuted the case, and also for any special expenses that the assignee may have been subjected to in consequence of that prosecution.

I am of opinion that it makes no difference whether the mortgage was adjudged constructively fraudulent under what is termed the statute of Elizabeth, as re-enacted, or under the special provisions of the Bankrupt Law.



UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The prevention of injury to the premises by not removing machinery is not a circumstance to be considered in determining the compensation to the landlord for the use of premises by the assignee.

A lease which cannot be assigned without the consent of the landlord is cancelled by the bankruptcy of the tenant.

The landlord is entitled to a reasonable compensation for the use of the premises from the commencement of the proceedings in bankruptcy until the surrender by the assignee, if the estate is benefited to that amount.

In re WILLIAM P. BRECK & WILLIAM B. SCHERMERHORN.

THE above bankrupts leased the premises No. 251 South Street and 495 Water Street, in the City of New York, from the petitioner, Richard S. Roberts, the owner of the same. The lease was for nine months, commencing May 1, 1873, and provided for rent to be paid at the rate of four thousand eight hundred dollars per annum. On December 13, 1873, the bankrupts filed their petition, and on the 16th of the same month were adjudged bankrupts, and from the 16th to the 31st days of December, both days inclusive, the Register was in possession of the premises. The property of the bankrupts consisted of machinery used in their business of sugar

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refiners, and was located in almost every part of the above buildings.

In January, 1875, Richard S. Roberts, above named, filed a petition with the court, asking that the assignee be ordered to pay to him the rent of these buildings for the sixteen days the Register was in custody of the property of the bankrupts and in occupation of the buildings, at the rate provided by the lease, which rent amounted to two hundred and thirteen dollars and thirty-four cents for the period. The court referred the matter to Isaiah T. Williams, Esq., Register in charge, to take testimony as to the truth of the same, and as to what ought to be paid for use and occupation.

The Register made his report and recommended that the petition of the landlord be dismissed.

Upon the matter coming before the court, the following decision was rendered by Justice Blatchford :

E. Ketchum, Jr., for the landlord.

The *Assignee*, in person.

BLATCHFORD, J.—While I concur in the general principles stated by the Register in his opinion in this matter, I do not concur in his application of them to the facts of this case or in his conclusion. The tenants had a right, as against the landlord, to remove the machinery, and the Bankruptcy Court had such right. But if in such removal of the machinery the building was injured, a claim would exist on the part of the landlord, both under the terms of the lease and on general equitable principles, to be reimbursed the amount of such injury by the parties removing the machinery. The fact, therefore, that such injury was prevented by not removing the machinery is not a circumstance that can be considered on the score of benefit to the landlord, in passing on the question before us.

As to the suggestion that the purchaser of the machinery hired the premises at once, and that thus the leaving of the machinery on the premises until it was sold was a benefit to the landlord equal to the amount of the rent he claims for

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such time, in giving him a tenant promptly, it appears clearly from the evidence that the benefit to the bankrupts' estate from not removing the machinery was far greater than any benefit to the landlord therefrom, leaving a value in the use and occupation of the premises, to be compensated for. The lease was undoubtedly cancelled by the bankruptcy, as, by its terms, it could not be assigned without the written consent of the landlord. So, also, the misfortune of the landlord in finding the lease at an end with the building full of machinery, was one which he must bear, in so far as it would interfere with his making a new lease until the machinery should be removed. But that circumstance ought not to affect his right to compensation for the use and occupation of the premises by the machinery until it was removed. There were in this case both injury to the landlord and benefit to the bankrupt estate from such use and occupation, in view of the foregoing considerations. The evidence is very strong that the estate was greatly benefited by not removing the machinery; that the benefit was far in excess of the amount claimed for the use and occupation; that it was reasonable and proper not to disturb or remove the machinery; and that the rate named in the lease is a reasonable rate of compensation for the use and occupation of the premises for the time in question. This conclusion seems to me to be fair and just to both parties, the landlord and the creditors of the bankrupts. An order will be entered that the assignee pay the sum of two hundred and thirteen dollars and thirty-four cents, for the sixteen days' occupation.

UNITED STATES CIRCUIT COURT—E. D. MISSOURI.

A creditor having demanded payment in full in advance as a condition of consenting to sign a composition agreement of the debtor to pay all his creditors seventy cents on the dollar, was held liable to repay the amount to the assignee in bankruptcy. Subsequently, on paying back the amount to such assignee of the debtor, the creditor

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sought to prove his *original debt* in bankruptcy, the composition having failed.

Held, under the circumstances, that he was entitled to establish his debt and receive dividends thereon.

*BROOKMIRE & RANKIN v. W. C. BEAN, Assignee,
etc., of CHARLES S. KINTZING.*

APPEAL in bankruptcy from the District Court. The firm of Brookmire & Rankin sought in the District Court to establish a claim for one thousand four hundred and thirty-six dollars and two cents and interest, against the estate of Charles S. Kintzing, bankrupt, for merchandise sold and delivered, and alleging that the note given by Kintzing & Co. for that debt "was canceled on the theory of its payment, which was an error." The assignee in bankruptcy resisted the claim. The parties stipulated below "that the question for determination by the District Court was whether, upon the facts as found, and the law as declared by the Circuit Court in the case of *Bean v. Brookmire*, reported 2 Dillon, 108; s. c., 7 N. B. R., 568; Brookmire & Rankin have a provable claim against the estate of Kintzing on account of the note referred to in that case, the decree rendered therein having been satisfied by Brookmire & Rankin." The District Court rejected the claim, and Brookmire & Rankin appeal. In this court the appeal was submitted upon the same stipulation. Before the following opinion was pronounced, the appellants, with leave of court, dismissed their appeal, with a view, as stated, to file a bill of review of the decree by which they were compelled to pay to the assignee the amount they had received from the bankrupt. 2 Dillon, 108; s. c., 7 N. B. R., 568.

G. M. Stewart, for Brookmire & Rankin, appellants.

Edmund T. Allen, for the assignee.

DILLON, C. J.—The controversy between the parties has already, in different forms, been several times before this court. *Bean v. Brookmire*, 1 Dillon, 24; s. c., 4 N. B. R., 196; s. c., 1 Dillon, 151; s. c., again, 2 Dillon, 108; s. c., 7 N. B. R., 568. In the first case cited, the assignee sued to recover back the one

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thousand four hundred and thirty-six dollars and two cents, which had been paid by the bankrupt to Brookmire & Rankin, and this recovery was sought on the ground that the payment was illegal preference under Section 35 of the Bankrupt Act; but as it was paid more than four months before the bankruptcy, it was held that the action was not maintainable. After that decision was made, the assignee brought a bill in equity to recover back this same sum of one thousand four hundred and thirty-six dollars and two cents, on the ground that it was fraudulently paid by the bankrupt to Brookmire & Rankin. 2 Dillon, 151. On the merits, this suit was subsequently decided against Brookmire & Rankin (7 N. B. R., 568; s. c., 2 Dillon, 108), and they paid the amount of the decree to the assignee. They now seek to prove the *original indebtedness or cause of action*, and the question is whether, upon the facts found, and the law stated in the case as reported in 2 Dillon, 108, they are entitled to have their claim established so as to share in the dividends of Kintzing's estate in bankruptcy? The facts as there found need not be here re-stated at length.

The question presented by this appeal has occasioned me much perplexity. The case is so peculiar as to make it difficult to ascertain the legal principles which should control its decision, and I determine it upon its own circumstances, and agreeably to what seems to me the substantial rights and equities of the parties, without undertaking to announce any rule of general or universal application.

Let us briefly recur to some of its leading features. And first, the original debt of Brookmire & Rankin against the bankrupt is confessedly just. It was for goods sold and delivered. On this debt Brookmire & Rankin have been paid nothing. The amount they received they have been compelled to pay back, on the grounds stated in 2 Dillon, 108; s. c., 7 N. B. R., 568. It will be recollected that they had refused to go into the compromise, and had commenced suit against Kintzing in the State court. Laflin, acting for Kintzing, went to Brookmire & Rankin, and, representing (according to the weight of testimony) that the money to pay the note had been raised by

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himself and Kintzing's friends, or by the latter, paid them the money on their delivering him the note with the indorsement: "We authorize S. H. Laffin to sign for us. Brookmire & Rankin." They entered the note on their books as "sold" to S. H. Laffin. Under the authority thus given, Laffin signed the name of Brookmire & Rankin to the compromise agreement to settle at seventy cents on the dollar. It is stated in the report (2 Dillon, 108; s. c. 7 N. B. R., 568) that "the evidence favors the view that the defendants (B. & R.) at first objected to making this indorsement, and finally did it without much reflection, and upon Laffin's assurance that it would be all right, and he would answer that the note should never come back or give them any further trouble. They did not seek Laffin or Kintzing, but were standing aloof from the proposed arrangement for a compromise, and pursuing, by suit in the State court, their own remedy against their debtor." It is further observed (2 Dillon, 108; s. c. 7 N. B. R., 568) that "the circumstances of the debtor were such that they could not obtain payment under a judgment against him, which would not be liable to be defeated by the Bankrupt Act." Tested by the subsequent decision of the Supreme Court, in *The City Bank v. Wilson*, 9 N. B. R., 97; s. c. 17 Wall., 473; this last observation is erroneous.

The compromise finally miscarried, as all the creditors did not unite in it, and all the other creditors were, in consequence, remitted to their original position, and to the right to claim one hundred cents on the dollar.

Now, why shall Brookmire & Rankin not be placed upon the same footing with the other creditors? As the compromise failed, there is no outstanding covenant in force against them whereby they have agreed to take less than the face of their demand, or to release it, and this material circumstance distinguishes it from the case of *Mallalieu v. Hodgson*, 16 Ad. & Ell., N. S., 689, so strongly relied on by the assignee. There the composition into which the plaintiff had entered *had been carried out*, and the plaintiff "had received the composition, and yet was seeking to gain a further exclusive

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advantage to himself, and in fraud of the creditors, by suing for the balance of his original debt after allowing for the composition and the value of the [secret] preference," *Ib.*, p. 712; and the court held that his release of the debt, made on entering into the composition, was binding upon him, and an answer to his claim to recover on the original demand. It was this release which defeated the recovery; but in the case before me there is no such release, and the composition fell through because all of the creditors did not come into the arrangement.

It is urged that the debt of Brookmire & Rankin is forfeited by their conduct in authorizing their names to be signed to the composition agreement. 2 Dillon, 108; s. c. 7 N. B. R., 568. That decision did not go upon the ground that any specific provision of the Bankrupt Act had been violated, but upon the general ground that Brookmire & Rankin had secured full payment as a condition of signing the composition articles, and had obtained it oppressively, so that the debtor could have recovered back the amount if he had not gone into bankruptcy, and this right devolved upon the assignee by reason of the bankruptcy.

That decision rested largely upon *Atkinson v. Denby*, 6 H. & N., 778; affirmed, 7 *Ib.*, 934. Of course the act of one creditor stipulating for a secret advantage to himself is a fraud upon the other creditors, but in what manner, in the absence of bankruptcy, these other creditors could have taken advantage of the fraud, and to what extent they could have compelled Brookmire & Rankin to refund on a creditor's bill, are questions by no means easy of solution. The conclusion in 2 Dillon, 108, was supposed to be strengthened by the circumstance that the assignee in bankruptcy represented the rights of the creditors as well as the bankrupt, but the decision essentially rests upon the principle of *Atkinson v. Denby*, and the cases which it follows. In the case last mentioned (*Atkinson v. Denby*), it is to be especially remarked that the composition was paid, and paid to the defendant as well as to the other creditors; and the action was not to

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recover the whole amount paid, but only the fifty pounds paid by the plaintiff in *excess* of the composition, and in excess of what the other creditors received. This is obviously a very different case from the one before the court.

The cases cited by the assignee's counsel, which I will not review in detail, undoubtedly establish this principle, viz.: that a "stipulation by a creditor for a secret advantage is altogether void. Not only can he take no advantage from it, but is also to lose the benefit of the composition." Erle, J., 16 Ad. & Ell., 689, *supra*; *Howden v. Haigh*, 11 Ad. & Ell., O. S., 1033; *Frost v. Gage*, 1 Allen, 262; s. c., 3 Allen, 560. He loses all rights which depend upon the illegal or fraudulent agreement, and if in this case Brookmire & Rankin were seeking to enforce a promise or claim based upon, or arising out of, the composition articles, it would logically result from the prior decision, and the principle of law in relation to composition agreements established by the authorities, that they could not succeed. But such is not their case. The composition failed, and was not carried out, and, therefore, never became binding upon any of the creditors. They were remitted, by reason of such failure, to their former rights; and the present claim is based upon the original consideration, and not upon the composition deed. Unless it is forfeited or barred, it must be allowed.

It is urged in argument that to permit Brookmire & Rankin now to prove the claim is inconsistent with their case in 7 B. R., 568; s. c., 2 Dillon, 108, in which they were held liable to pay back the money received on this same debt. But not so. To have allowed them to retain the full amount of their debt would have given them an unjust advantage over the other creditors, and, as this advantage was unfairly obtained, the court held that they must pay back the money. If the compromise had been carried out, perhaps the court would have limited the recovery to the excess which they received over the other creditors. That suit compelled them to repay the money they had unfairly gained. This put the parties *in statu quo*. The debt of Brookmire & Rankin revived against the bank-

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rupt, and it may be established against his estate. The effect is equitable. It puts all creditors upon an equality. If Brookmire & Rankin had been active in steps to procure full payment, and had positively designed to commit a fraud, I should have felt more reluctance in coming to the conclusion that they should be allowed to establish their debt in bankruptcy. They have done nothing which justly works a forfeiture of their original debt, and, if there is any such principle in the law as that fraudulently or illegally entering into a composition agreement works a forfeiture of the original debt, *when the composition fails*, which I very much doubt, I think that the present case is one to which that principle should not be applied.

UNITED STATES DISTRICT COURT.—W. D. MISSOURI.

A by-law of a corporation prohibiting the transfer of stock, by one who is indebted to the corporation, is proper and reasonable.

A debt not due falls within the meaning of the by-law recited in the opinion of the court, the same as one due at the time of the transfer.

A liability for an unpaid and uncalled-for balance on subscription for stock, is a debt within the meaning of said by-law.

The officers of the corporation have no power to waive the provisions of such a by-law.

And any construction given said by-law by the officers or directors of the company, furnishes no rule for a construction by this court.

The capital stock of a corporation is a trust fund for the benefit of its creditors, and no transfer thereof can be made by which, as to creditors of the company, a stockholder can relieve himself from liability for his subscription for stock, and substitute that of another person.

In re BACHMAN.

Karnes & Ess, for plaintiff.

Johnson & Botsford, and *Gage & Ladd*, for defendant.

KREKEL, J.—On demurrer to answer.

The assignee in bankruptcy brings this his suit to recover of defendant six thousand dollars, balance of stock subscription of seven thousand five hundred dollars, on which two payments, one of seven hundred and fifty dollars, prior to

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organization, and another of seven hundred and fifty dollars, on call after organization, had been made. The petition is in the usual form, declaring on balance of subscription.

The answer is, that on the 9th day of November, 1871, the defendant sold and assigned to one Keefer, sixty-five shares of the stock by him held (on which twenty per cent. had been paid, twenty-two dollars and sixty-six cents per share); that he assigned the certificate in due form, and that the transfer was duly entered upon the books of the bank; that Keefer at the time of the sale and transfer was solvent, and that defendant did not make the sale to avoid any responsibility on his part to the bank: that at the time of said transfer on the books of the bank, he received the notes which he had executed for his stock to the bank, to the amount of six thousand five hundred dollars, and therefore claims that he is discharged from any liability to the bank on account of said subscription to the extent of six thousand five hundred dollars.

As to the remaining ten shares, the answer sets up a similar assignment to Tobener, who was president of the bank, but does not allege that the assignment and transfer were entered upon the books of the bank (but alleges knowledge on the part of the bank of the assignment), and avers that the remainder of his stock notes were delivered up. This last assignment was made on the 10th day of February, 1873, is alleged to have been *bona fide* and for value, and that Tobener was then and is now solvent, and therefore claims to be discharged of any liability on account of these ten shares.

The bank was declared bankrupt on the 12th of April, 1873.

To this answer a demurrer is interposed, assigning for causes, that the assignments and transfers set up constitute no defense as to the sixty-five, nor ten shares of stock, because the defendant at the time of making the assignment and transfers was indebted on stock subscription to the bank, and that being so indebted, he could not make a valid assignment and transfer, on account of a by-law prohibiting it, so long as he was indebted to the bank.

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As to the ten shares, the demurrer assigns in addition to the indebtedness, that the transfer was never made on the books of the company.

This bank was organized under the general incorporation act of the State of Missouri, containing this provision, among the enumerated powers of organization under it: "To make by-laws not inconsistent with existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock."

One of the by-laws of the bank provides as follows: Certificates may be assigned by indorsement on the back, but no transfer of stock shall be valid except when made upon the books of this bank, on return of said certificate, and no transfer shall be made or allowed by any stockholder who at the time is indebted to the bank. Stock may be transferred by the owner or by a legally authorized agent."

The reasons assigned by defendant why this by-law does not apply to the case before the court, are, that stock subscription is not a debt within its meaning; that if it is, the officers of the bank had a right to, and have waived it, and that the construction contended for by plaintiff would make the stock unassignable while not fully paid up, thus coming in conflict with the law of the State which declares its personal estate transferable in the manner prescribed by the laws of the company; "but no shares shall be transferred until all previous calls shall have been fully paid in." (1 Wagn. Stat. 292, Section 16.)

The stock certificates of the bank are as follows:

"Kansas City, Mo., Feb. 12, 1870.

"This certifies that Q. A. Bachman is the owner of — shares of the capital stock of the Union German Savings Bank, of Kansas City, Mo., transferable only on the books of said bank, in accordance with the by-laws thereof, in person or by attorney, on the surrender of this certificate.

"P. W. DITSCH,
"President.

"Signed. JOHN S. HARRIS, Cashier."

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On the back of said certificate there was a printed blank form for the transfer thereof, in words and figures as follows :

“ For value received ——— hereby sell, transfer, and assign ——— shares of stock within mentioned, authorize the cashier of said bank to make the necessary transfer on the books of the bank.

“ Witness ——— hand and seal, this ——— day of ———, 187—. “————.” [SEAL.]

The answer regarding the assignments alleges that these blanks were properly filled when assignments and transfers were made.

Chief Justice Waite in *Pollard v. Baily*, 11 N. B. R., 276, says that “ the individual liability of stockholders in a corporation, for the payment of its debts, is always a creature of the statute. At common law it does not exist.” We must then look to the statutes of Missouri to determine the liability of the defendant. As the question mainly turns upon the by-law regarding transfers of stock, while stock subscription remained unpaid, the first inquiry is : Does it conflict with any law of the State if it is construed to prohibit assignment of stock, while part of the subscription for it remained unpaid ? The Supreme Court of Missouri has said, that even if such by-law did conflict with the general law governing transfer of property in this State, it is valid. *St. Louis Perpetual Insurance Company v. Goodfellow*, 9 Mo., 150 ; *Mechanic's Bank v. Merchant's Bank*, 45 Mo., 513. In what it would be said to conflict with the statute law governing the transfer of personal property, is not easy to be seen. Here is the creation of a peculiar kind of property by the State, by virtue of its incorporation acts, and to say that it cannot attach conditions looking to the better security of creditors regarding the transfer of stock, is to deny it a control which experience is demanding. Nor must it be overlooked that it is not interfering with the disposition of the stock, further than requiring it to be done on conditions. The by-law is held not to be in conflict with the statute law, but proper and reasonable.

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The next inquiry is : Was the unpaid subscription conflicting with the case of *Hall v. U. S. Ins. Co.*, 5 Gill., 484, a debt within the meaning of the by-law ? The Missouri cases decide that it makes no difference whether the debt is due or to become due, that either fall within the by-law. The difference between the cases cited and the case before the court, is, that they were ordinary debts, such as loans and indorsements, and here it is a balance on stock subscription. This is certainly a debt, and a debt of a very high nature. Justice Miller in the case of *Sawyer v. Hoag*, 9 N. B. R., 145; s. c., 17 Wallace, 610, speaking of stock subscriptions, and the right of creditors of insolvent corporations to look into and assail the transaction by which defendant claims to have paid it, says : " Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last four years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern for the occasion, for it could no sooner have arisen."

But it is said, and so alleged in the answer, that the by-law was never understood, construed, or intended by the officers or directors of the bank, as prohibiting or preventing the transfer of stock by reason of being indebted on unpaid stock subscription. The answer to this is, that a creditor of an insolvent bank is not bound by what the officers and directors may have understood, or now, after the bank is insolvent, understand, by the by-law. No act of the corporation, as distinguished from acts of its officers, is pleaded to show its understanding, and still, if it were, it is very questionable whether they could thus indirectly be permitted to fritter away a by-law which the law authorized them to make, and which they did make. The allegations of the answer, that the purchasers of the stock were insolvent at the time of

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making the transfers, may show the prudence of defendant with reference to further liability, but cannot change his obligation as a subscriber of stock. Could the officers of the bank who entered the transfer of the sixty-five shares of the stock to Keefer on the books of the bank, and delivered up the stock notes, waive the by-law regarding the indebtedness to the bank, and thereby make the transfer valid? But for the delivering up of the stock notes, all other acts of theirs could well be construed as not intending to release the original subscriber, for they may have viewed it as getting additional security. Be this as it may, for the want of power in them, their acts are void and of no avail, so far as it affects the liability of this defendant to the bank and its creditors, here represented by the assignee.

A more difficult question, however, arises in case the views expressed as to the argument and transfer of the stock and the powers of the officers of the bank are erroneous, and that is: Can a stockholder, even by the consent of the officers of the bank, discharge the liability of an original stock-subscriber, and undertake to substitute another party in his place, without the stock being paid up when creditors are to be affected?

In the case of *Sawyer v. Hoag*, already cited, it is said that "the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration." Assuming that the officers of the bank intended to act fairly and honestly, they certainly did not obtain any consideration whatever in the transfer. They seem even to have failed, so far as the pleadings show, to take any obligation of Keefer, whatever, a requirement necessary, according to a number of decided cases, to make the transfer valid. That they acted in violation of the by-law, if it applied to stock-subscription, cannot be doubted. Looking into the nature of the transaction itself, we find a number of subscribers taking stock, all, perhaps (except the first), be-

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cause of the known ability of co-subscribers to meet their undertakings. In order to avoid having others not known to them substituted in their place, they cause a by-law to be passed that no stock shall be transferred, unless it be done upon the books of the bank and on return of certificate, and no transfer to be *made* or *allowed* by a stockholder who at the time is indebted to the bank. Well may the Supreme Court of Missouri consider this a reasonable by-law; and no less strong is the appeal to this court not to interfere with the security which subscribers for stock have thus provided for themselves and creditors.

The stock certificate sets out on its face that transfers must be made in accordance with the by-laws of the bank, so that all parties had notice, and therefore cannot complain if their attempt to violate it is held nugatory and of no avail. Holding original subscribers to stock liable, so far as creditors are concerned, until the whole of the stock subscribed is paid, avoids all conflicts, so far as the various provisions of the statute in reference to collecting dues are concerned, and is on that account to be favored, as well as because it affords the remedy intended when the organization was effected.

In reference to the transferring of stock, the statute, as we have seen, provides that no shares shall be transferred until all previous calls thereon shall have been fully paid up. It is contended that, the law limiting the transfer of stock to unpaid calls, the board had no right by by-law to still further limit it. This is not the view of the Supreme Court of Missouri in the cases cited. The Legislature may well have intended that, so far as calls were concerned, they should, at any rate, be paid in order to afford security to that extent, at least, and to avoid disputes as to who should pay them, leaving any further limitation and security to be provided by the stockholders, which they did in the legitimate exercise of their authority.

The foregoing views apply to the ten shares as well as to the sixty-five shares. But the fact that the transfer of the ten shares was not entered upon the books of the bank, and that the transferee is responsible, calls for an opinion as to

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the effect of the difference. The by-law, aside from the provision that the assignor shall not be indebted to the bank at the time of making the transfer, also provides that it must be done on the books of the bank. It is not sufficient to have authorized an officer of the bank, by filling up the blank on the back of the certificate. That officer, by virtue of the authority given him, became the agent of the defendant, and not the bank, and if he failed to act, the laches were those of the defendant. The fact that Tobener was the president of the bank, and that the assignment was brought to the notice of the officers of the bank, cannot be substituted for the requirements of the by-law. That Tobener, the assignee, is insolvent, might become a question if the assignor was insolvent, and an attempt was made to collect the balance of unpaid stock on the ten shares of him. An assignee of stock may, no doubt, do such acts as make him liable to the corporation and its creditors, but under the holding, this is not necessary to be determined.

The law on the demurrer is with the plaintiff, and the demurrer sustained.

UNITED STATES DISTRICT COURT—E. D. VIRGINIA.

A consignment of goods under a special contract, in which the consignee gives his acceptances for their value, payable partly at sight and partly at a future day, and agrees to account for the whole price, to guarantee the sales, and to receive a commission of ten per cent., with other stipulations, making him primarily liable for the price of the goods, falls within the principle of *Ex parte White in re Nevill*, Eng. L. R. Ch. Ap. C., 397, and is a consignment on sale, as distinguished from a consignment on *del credere* guaranty.

Though a consignor may reserve a special property in goods consigned until bills of exchange, drawn for their price, are paid to the bill-holders, yet he cannot, in a consignment on sale to a consignee, in which no such special property is reserved to protect bills drawn upon the consignee for their price, reserve a special property in notes and accounts, which the consignee may take for the goods, from persons to whom the consignee may sell them, as against other creditors of the consignee, who goes into bankruptcy.

Ex parte FLANNAGANS, In re CHAMBERLAINES.

THIS case is heard on the petition of B. C. Flannagan & Co., against the assignee of R. & H. Chamberlaine, bankrupts,

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claiming a special property in certain claims and accounts held by the assignee.

W. W. Old, Esq., for the petitioners.

John S. Tucker, Esq., for the assignee.

The facts of the case are stated by the judge in his decision, which was as follows :

HUGHES, J.—During the year 1873, B. C. Flannagan & Son, manufacturers, of Charlottesville, Va., had dealings with R. & H. Chamberlaine, commission merchants, of Norfolk, in a manure called the *Stonewall Fertilizer*, under the following contract, made on the 6th of December preceding :

December 6.

We propose to give you the entire agency for Stonewall Fertilizer, at Norfolk, and for the State of North Carolina, Raleigh excepted, on condition you push the sales and have a proper man to look after it, and to allow you a commission of ten per cent. for sales and guarantee.

We to draw on you at sight or short time for thirty dollars a ton. . The price to be sold at is sixty-five dollars in Baltimore. ' For balance, after paying thirty dollars, you to give your acceptances, say payable 1st December, 1873 ; accounts to be rendered and settlements after the selling season is over. No charge to be made for storage during the season. Any guano left over and not sold is to be at the risk and on our account.

Respectfully,

B. C. FLANNAGAN & SON.

Messrs. R. & H. CHAMBERLAINE, Norfolk.

P. S. We agree to furnish the guano delivered in Baltimore, one hundred tons to be delivered in January, 1873, and balance as ordered by you. We will ship in lots to any point you may direct.

B. C. FLANNAGAN & SON.

[Across the face of the above.] Accepted December 6th, 1872.

R. & H. CHAMBERLAINE.

On the 7th January, 1874, at the solicitation of B. C. Flannagan, R. Chamberlaine met him in Richmond for a confer-

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ence, when they signed the following paper, which was drawn by Flannagan, and which Chamberlaine with difficulty and reluctance assented to.

January 7.

Whereas R. & H. Chamberlaine have sold as agents for B. C. Flannagan & Son, their Stonewall guano, during the spring of 1873, according to contract between them, dated December 6, 1872, to which reference is hereby made; they having guaranteed said sales; and whereas, according to the terms of said contract, the balance due from said Chamberlaine to said Flannagan was due and payable December 1, 1873, but owing to the failure of planters, to whom said Chamberlaine sold, to comply with their terms of purchase, the said Chamberlaine has found it impossible to meet his said acceptances at maturity, and in consequence some of them have gone to protest. The said Flannagan, in order to assist the said Chamberlaine and give more time for his collection from planters, has this day taken from the said Chamberlaine sundry acceptances, dated this day, and maturing at an interval of ten days, running to one hundred and thirty days inclusive, the proceeds of which he agrees and binds himself to use in payment of said protested acceptances. And as a further assistance to the said Chamberlaine, the said Flannagan agrees that if the said Chamberlaine finds it impossible to meet the said several acceptances, dated January 7, at maturity, the said Flannagan will further assist him by a renewal of same, and will not allow them to be protested.

The said Chamberlaine for his part agrees and binds himself to use all due diligence in collecting from the parties to whom he sold as agent of the said Stonewall, and apply all proceeds from said parties strictly to the payment of the said acceptances, dated January 7. It being understood and agreed that such collections are held by him as agent only, and belong properly to the payment of said acceptances aforesaid, he having sold as agent with the guarantee of payment.

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The renewed acceptances were ten of fifteen hundred dollars each, and one of ten hundred dollars. This latter acceptance, and one for fifteen hundred dollars, which two were the first to mature, were paid by the Chamberlaines. Those still remaining unpaid are for the aggregate sum of thirteen thousand five hundred dollars. The books of the Chamberlaines show that the amount of their actual indebtedness for the fertilizer, on the 27th of April, 1874, was thirteen thousand one hundred and forty-three dollars and fifty-nine cents, exclusive of interest. They owed the Flannagans three hundred and sixty-eight dollars and nine cents on a cotton transaction, which had no connection with the fertilizer. The amount of the outstanding accounts held by the Chamberlaines against planters for the fertilizer, on April 27, 1874, was thirteen thousand nine hundred and seventy-four dollars and four cents. Fertilizer was shipped to the value of forty thousand dollars.

The Flannagans brought an action at law on the acceptances in the summer of 1874. The effect of their suit was such, that in October, 1874, the Chamberlaines filed their petition in bankruptcy; and the suit stands suspended in the court of law. Under a consent order of this court in this case, the assignee in bankruptcy has been allowed to employ an agent for the collection of the debts due by planters for the fertilizer, who has made some collections. The unpaid claims against the planters for fertilizer will be of slow collection, and will not realize, by a considerable per centage, the amount due upon them.

The Flannagans now come in by petition, setting forth the two contracts that have been described, and the condition of facts recited, and claiming not only that the Chamberlaines are bound for the amount of the unpaid acceptances, on which they have sued, but that the notes, accounts, and claims which the Chamberlaines held against planters for the fertilizer, and which have passed to the custody of the assignee in bankruptcy, shall be turned over to themselves for collection; that when collected by themselves the amounts realized from these

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claims shall be credited on the amounts due on the Chamberlaines' acceptances; and that the debt of the Chamberlaines shall be treated as a fiduciary debt, and dealt with as such in considering the petition of the Chamberlaines for discharge.

The questions arising upon the two contracts are chiefly important with reference to the petition of the bankrupts for a discharge, though that petition is not yet before the court for hearing.

The questions now to be decided are these, viz. :

First. Were the shipments of this fertilizer under the contract of December 6, 1872, a mere consignment on a *del credere* guarantee, or were they on sale?

Second. If a sale, did the shipments pass the whole property in the fertilizer to the Chamberlaines, or was there a special property reserved constituting in favor of the Flannagans a preferred claim upon the proceeds of the fertilizer in the hands of the Chamberlaines?

First. It is clear that the contract of December 6, 1872, did not provide for consignments to the Chamberlaines as ordinary factors, for sale on the usual commissions. Nor did it provide for consignments upon the ordinary *del credere* commission of guaranty. Had it done either of these things, the well-settled law, either of simple or *del credere* agency, would have clearly determined the rights and liabilities of the parties.

But these consignments were not made upon any sort of implied contract. They were made upon an express contract, definite in terms, written and mutually signed. We cannot, therefore, go out of such a contract to the law of general consignments, or of *del credere* agencies, to ascertain the rights and liabilities arising from their own stipulations. It is only when there is no special contract that the general law of agency applies between consignor and consignee; for it is always competent for persons in this relation to contract according to their pleasure, and thus vary or restrict, or enlarge, the general liabilities implied by the law in absence of express contract. Story's Agency, Section 334.

What were the provisions of the contract of December 6,

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1872? The Chamberlaines were to be responsible for all the sales of the fertilizer which they should make. They were to be themselves primarily responsible. They were to discharge this responsibility by acceptances payable at sight, or on short time, as to part, and at a future day as to the residue of the price of the fertilizer. They were to have a commission of ten per cent., not on their own sales, but on the price of the article, fixed in advance by the consignors. They were, at the end of the season of business, to be credited with so much of the article as should then remain on their hands. They were not to charge storage upon the fertilizer, but if any of it remained on hand after the season was over, they were then to be entitled to storage on such surplus. In the contract, the terms "agency," "guarantee" and "commission" are used, implying that the parties considered that in the transaction about to be made they should hold the relation to each other of principal and agent.

The question is whether this contract constituted the Chamberlaines purchasers of the fertilizer, or merely agents for its sale on a *del credere* guarantee. If the contract in its terms really constituted them purchasers, the use of words implying that they were agents does not change the fact. "Persons may suppose that their relationship is that of principal and agent, when in point of law it is not." *Ex parte White, in re Neville*, L. R., 6 Ch., App., 397. If the consignments were a sale, they were a final sale as to the portion of the fertilizer which should be disposed of during the season by the Chamberlaines; and, as to the portion remaining over at the end of the season, they were consignments on "sale or return."

Upon the authority of the case of *ex parte White, In re Neville*, above cited, and of Section 215 Story's Agency, about to be referred to, I think the consignments were a sale, and not a shipment on a *del credere* guaranty. For here the obligation of the Chamberlaines to pay for the fertilizer at a fixed price, and a fixed time, was clearly established by the contract. They were primarily liable to the Flannagans for

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the fixed price, on their acceptances. They might sell to planters at a different price, so far as the obligation imposed by the contract was concerned. If the planters were to be liable to the Flannagans at all, they were to be so only secondarily. The Flannagans looked to the Chamberlaines only, and did not know the planters in the whole transaction.

The now well-settled law of *del credere* guaranty is that the factor is not the primary debtor; that his engagement is merely to pay the debt if it is not punctually paid by the person to whom he sells; that he stands more in the character of a surety than a debtor; and that he is not liable to pay the debt until there has been default by the person who buys from him. Story's Agency, Section 215; citing numerous English and American cases. Can it be pretended that the stringent contract of December the 6th left the Chamberlaines in the secondary and optional relation to the Flannagans thus described, in respect to the article which they paid for as it arrived with their acceptances? Lord Justice Melish, in *ex parte* White, *In re* Neville, distinguishes between consignments on *del credere* guaranty and those on sale in the following explicit language: "If the consignee is at liberty to sell at any price, and to receive payment at any time he likes, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contracts of sale, which the consignee makes with the persons who purchase from him, are not contracts made on account of his principal, for he is to pay a price which may be different, and at a time which may be different, from those fixed by these contracts. He is not guaranteeing the performance, by the persons to whom he sells, of their contract with him, which is the proper business of a *del credere* agent; but he undertakes to pay a certain fixed price for the goods, at a certain fixed time, to his principal, wholly independent of what the contract may be which he makes with the persons to whom he sells; and my opinion is that, in point of law, the alleged agent in such a case, in

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making, on his own account; a contract of purchase with his alleged principal, is again reselling."

The Flannagans themselves treated the consignments as a sale to the Chamberlaines. After the acceptances, which they received under the contract of December, 1872, had matured and been protested, they did not treat the Chamberlaines as their debtors on open account, in the direct character of guarantors of the sales which had been made to planters, but they treated them as directly indebted on the acceptances which remained unpaid. If the Chamberlaines had been guarantors only, their liability would not have been fixed until after proper means of collecting the dues from planters had been exhausted. But the Flannagans declined to look to them in that character. They treated them as already indebted, and dealt with the unpaid acceptances as the evidence of their indebtedness.

Even supposing the Flannagans, by the terms of the contract of December, 1872, to have reserved for themselves the option of treating the Chamberlaines either as agents or as purchasers at pleasure, yet, by the contract of January, 1874, they availed themselves of this option, and did elect to treat them as purchasers; for they accepted a novation of new acceptances in place of the old ones for the whole value of the fertilizer not yet paid for. It is true that the Flannagans did, to the latter contract providing for the novation, append a clause in the following words, viz. : " It being understood and agreed that such collections are held by Chamberlaine as agent only, and belong properly to the payment of said acceptances, having sold as agent with his guarantee of payment." But the most that can be claimed for this stipulation in determining the question whether the consignment was upon purchase or guarantee, is that it preserved to the Flannagans the option of electing afterwards, and a second time, whether to rely upon the new acceptances for payment of the moneys due them, or to resort to the notes and accounts due from the planters. Supposing this right of choosing between these alternatives to have been reserved, still,

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even in that case, the choice of the Flannagans, thus reserved, *was* made in the summer of 1874, when, instead of going against the planters as first liable to them before the Chamberlaines were so as guarantors, they ignored the planters, and brought suit against the Chamberlaines on their acceptances.

If the Chamberlaines were liable as purchasers, then the Flannagans had a right to sue them on their acceptances. If they were not liable as purchasers, but only as guarantors, then they could have been sued only after the remedy against the planters had been exhausted, on open account.

Upon the whole case, therefore, I am of opinion that not only did the contract of December, 1872, and the transactions of 1873 under it, make the Chamberlaines purchasers instead of agents; but the Flannagans, in the contract of January, 1874, and in the suit brought in the summer of that year, themselves elected to treat them as such, and committed themselves to that view of the contract.

It may be admitted that if the terms used in the writing of January, 1874, had been employed in that of December, 1872, it would have been difficult to resist the conclusion that the consignments made under it were to the Chamberlaines as agents and not as purchasers. But the second contract came too late to have any effect upon the dealings. If the original paper of December, 1872, provided for a sale, and the transactions under it were those of sale and purchase, then the contract of January, 1874, made after all the dealings were over, could not, by any language put into it, change their character already fixed and determined. Nor could the agreement of the Chamberlaines in January, 1874, to apply their collections from the planters to the payment of the acceptances, change the previously fixed fact that they were purchasers, if they really were so. That agreement was a merely voluntary one to comply with an obligation of honor.

Second. Having concluded that the consignments of the Flannagans to the Chamberlaines were made to the latter in the character of purchasers, and not of agents, it is next to

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be inquired whether the sale was absolute or qualified. The principle of the leading case of *Jenkyns v. Brown, Shipley & Nicholson*, 14 Ad. & Ell., 496, is that when a consignment is made, and bills of exchange are drawn for the value, and bills of lading are sent to a third person to be delivered on payment of the bills of exchange, a sale is made, in which a general property passes to the consignee, and a special property is reserved by the consignor until the payment of the value. In other words, a sale may take place on a consignment, although a special property in the thing consigned be reserved by the consignor.

In the leading case of the *Bank of Ireland v. Perry*, L. R., 7, Exch., 14, it is decided, that where a consignor reserves a special property in the goods consigned, that special property follows the goods in favor of the holder of bills of exchange drawn against them, when the consignee goes into bankruptcy or composition. The principle on which the billholder is allowed the benefit of this special property, as against other creditors of the insolvent, is explained by Bispham in his recent tract on Contracts In Rem, to be that under the original consignment a *jus in rem* in the goods is acquired by contract, as against the world, by the drawer of the bills in favor of himself and the persons holding the bills from him; and that, being a *jus in rem* against the world, this special property follows the goods into the hands of assignees or trustees of an insolvent consignee. If this principle be not yet conceded in courts of law, it fully obtains in courts of equity, and must be applied in this court.

I think that the intention of the Flannagans to reserve a special property in the proceeds of the fertilizer sold by the Chamberlaines to planters is too plain to be denied. But was that intention effected? The principle of the two cases just cited is that the consignor may reserve a special property in the goods consigned, for the protection of bills which he himself draws against the goods; but they do not go so far as to hold that he may reserve a special property in favor of himself in bills which his consignee may draw upon sales of

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the goods which the consignee shall make. Courts of law have scarcely yet recognized the principle of the cases of the *Bank of Ireland v. Perry*, above cited, and of *ex parte Waring*, 19 Vesey, 345, and courts of equity have not advanced so far as to allow the original consignor to bind the proceeds of goods after they have been received by the consignee and sold to second consignees or purchasers. The law would have allowed the Flannagans to bind the goods in favor of the holders of the drafts drawn by themselves, but it would not follow the sale of the goods by the Chamberlaines and bind in favor of the Flannagans the notes and accounts taken by the Chamberlaines. If the Chamberlaines were now acting in their own right and were responsible, the concluding clause of the contract of January 7, 1874, would bind undoubtedly the notes and accounts due from the planters in favor of the Flannagans as against the Chamberlaines. But the bankruptcy of the latter has thrown these notes and accounts into the hands of their assignee, subject to the rights of other creditors ; and it would be carrying the doctrine of *jus in rem* too far to hold that the Flannagans have a special property in those notes and accounts, as against general creditors. I am bound to decide, therefore, that the Flannagans have no special property in the notes and accounts due from planters for the fertilizer sold by the Chamberlaines, and that these *choses in action* are part of the general assets in this cause.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

In order to obtain a discharge, a voluntary bankrupt is only required to file the consent of the requisite proportion of the creditors to whom he is liable as principal debtor, and who have proved their claims.

In re JAMES C. DERBY.

S. V. R. Cooper, attorney for the bankrupt.

BLATCHFORD, J.—This is a case of voluntary bankruptcy, the petition in which was filed on the 7th of August, 1874. Proceedings with a view to a discharge have been taken and conducted to the point of the certifying of the proceedings to the court by the Register. The Register certifies that the bankrupt has in all things conformed to his duty under the Revised Statutes, and has conformed to all the requirements of the Revised Statutes, unless the court should be of opinion that the 9th Section of the Act of June 22d, 1874, requires the assent of one-fourth in number and one-third in value of all the creditors of the bankrupt, including alike those who have and those who have not proved their claims. Five creditors only have proved their claims. The claims so proved amount to two thousand one hundred and forty-five dollars and eighty cents. Of those five creditors, three, whose claims, as proved, amount to one thousand six hundred and sixty dollars, have assented to the discharge. The number of creditors whose claims are set forth in the schedules annexed to the voluntary petition is forty-four, and the amount of their claims is seventeen thousand eight hundred and seventy-three dollars. Of those forty-four, only the three creditors above referred to, with proved claims amounting to one thousand six hundred and sixty dollars, have signed the assent. One-fourth in number and one-third in value of the creditors of the bankrupt have not signed the assent.

When the Act of June 22d, 1874 (18 U. S. Stat. at Large, 178), was passed, the provision of law in force as to discharges was Section 5112 of the Revised Statutes, in these words: "In all proceedings in bankruptcy commenced after

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the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty *per cent.* of the claims proved against his estate, upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case, at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first day of January, eighteen hundred and sixty-nine." The 9th Section of the Act of June 22d, 1874, provides as follows: "That in cases of compulsory or involuntary bankruptcy, the provisions of said act" (the Act of March 2d, 1867), "and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of a discharge from his debts, shall not apply; but he may, if otherwise entitled, be discharged by the court, in the same manner and with the same effect as if he had paid such *per centum* of his debts, or as if the required proportion of his creditors had assented thereto. And, in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty *per centum* of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of, at least, one-fourth of his creditors in number, and one-third in value; and the provision in Section 33 of said Act of March 2d, 1867, requiring fifty *per centum* of such assets, is hereby repealed." Section 21 of the Act of June 22d, 1874, repeals all acts and parts of acts inconsistent with its provisions.

The former statute, when it spoke of an assent of creditors as being necessary, spoke of it as an assent in writing of a majority in number and value of the creditors of the debtor to whom he should have become liable as principal debtor, and who should have proved their claims, and prescribed that

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such assent should be filed in the case at or before the time of the hearing of the application for discharge. The new statute, when it speaks of an assent of creditors as being necessary (and which is only in cases of voluntary bankruptcy), merely says that the discharge shall not be granted to the debtor "without the assent of, at least, one-fourth of his creditors in number, and one-third in value." It does not, in terms, as before, require the assent to be in writing. It does not in terms, as before, require the prescribed proportion in number and in value to be computed only upon creditors to whom the debtor shall have become liable as principal debtor. It does not, in terms, as before, require the prescribed proportion in number and value, to be computed only upon such of the creditors to whom the debtor shall have become liable as principal debtor, as shall have proved their claims. It does not, in terms, as before, require the assent to be filed in the case, at or before the time of the hearing of the application for discharge. Yet all these are matters as to which inquiry at once arises, under the new statute. Must the assent be in writing? Are the creditors referred to in the new statute only the creditors to whom the debtor shall have become liable as principal debtor, or are other creditors to be included? Where it is determined what creditors are thus to be recognized, is the prescribed proportion to be computed only upon such of those creditors as have proved their claims, or upon all of those creditors? Is it sufficient to file the assent at or before the time of the hearing of the application for discharge, or must it be filed at or before the time of the application for discharge, as was required by Section 33 of the Act of March 2d, 1867 (14 U. S. Stat. at Large, 533). No aid is derived from the language of the new statute, in answering any of these inquiries; except what may be derived from the naked language that the assent is to be "the assent of at least one-fourth of his creditors in number, and one-third in value." I do not think, in view of the course of legislation on the subject, and of the structure of the 9th Section of the Act of June 22d, 1874, that the expression "his

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creditors" in the clause therein in regard to discharges in cases of voluntary bankruptcy, is necessarily to be interpreted to mean *all* the creditors of the debtor, whether they have proved their debts or not.

In the former statute, the provision as to assent is introduced by the word "unless." No discharge shall be granted to a debtor whose assets shall not be equal to a specified percentage of certain specified claims, "unless" the assent in writing of a majority in number and value of certain specified creditors is filed in the case by a certain specified time. The sentence is a complete one in itself. It provides that a discharge shall not be granted to a debtor, who answers a specified description, "unless" the court finds affirmatively certain specified things to exist, which are, (1) that an assent in writing be filed; (2) that it be the assent of a majority in number and value of the creditors of the debtor to whom he shall have become liable as principal debtor, and who shall have proved their claims; (3) that it be filed at or before the time of the hearing of the application for discharge. The new statute merely says, that, in cases of voluntary bankruptcy, a discharge shall not be granted to a debtor, who answers a specified description, "without" the assent of at least one-fourth of his creditors in number, and one-third in value. The sentence is an incomplete one. It does not require the assent to be in writing, or to be filed, or to be filed by any specified time, and it leaves open the question, as to what is meant by the expression "his creditors."

Section 33 of the original Bankruptcy Act of March 2, 1867, required the assent in writing of a majority in number and value of the creditors who had proved their claims, and required it to be filed at or before the time of the application for discharge, but required it only where the assets of the debtor did not pay fifty *per centum* of the claims against his estate. The Act of July 27, 1868 (15 U. S. Stat. at Large, 227), required the assent, when unnecessary, to be the assent in writing of a majority in number and value of the creditors to whom the debtor should have become liable as principal

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debtor, and who should have proved their claims, and required it to be filed at or before the time of the hearing of the application for discharge, but required it only where the assets of the debtor should not be equal to fifty *per centum* of the claims proved against his estate, upon which he has become liable as the principal debtor. It then repeals the provision requiring fifty *per cent.* of such assets. It thus, in respect to voluntary cases, in specifying the cases where an assent is required, requires it, as before, in cases where the assets of the debtor do not equal a certain percentage of the claims proved against his estate, upon which he has become liable as the principal debtor, and only in such cases, and merely changes the percentage from fifty to thirty. Then, as to what the assent is to be. The former statute required it to be the assent in writing of a specified proportion in number and value of the creditors of the debtor, to whom he had become liable as principal debtor, and who had proved their claims, and required it to be filed at or before the time of the hearing of the application for discharge. The new statute prescribes the assent merely as an assent of at least one-fourth of the creditors of the debtor in number, and one-third in value. But the change the new statute was aiming to make in respect to voluntary cases was, clearly, a change beneficial to the debtor by prescribing terms less onerous than were before required. But, if the debtor's assets did not equal fifty *per cent.* of the claims proved against his estate, upon which he had become liable as the principal debtor, he was required to obtain an assent of creditors. Now, he was not to be required to obtain any assent of creditors unless his assets did not equal thirty *per cent.* of such claims. So, before, when the debtor was obliged to obtain an assent, it was required to be the assent in writing of a majority in number and value of the same creditors who were to be reckoned in computing the percentage in assets—that is, creditors to whom he had become liable as principal debtor, and who had proved their claims, and the assent was to be filed, and it was sufficient to file it at or before the time of the hearing of the application

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for discharge. Now, the change to be made was one beneficial to the debtor, by imposing on him less rigorous terms, and the change was to annul the requirement of the assent of the majority in number and value of the creditors who were to be reckoned in computing the percentage in assets (that percentage being changed from fifty to thirty), and to prescribe instead the assent of at least one-fourth in number and one-third in value of the same creditors—that is, creditors to whom the debtor should have become liable as principal debtor, and who should have proved their claims, leaving the assent still to be required to be in writing, and to be filed, and to be sufficient if filed at or before the time of the hearing of the application for discharge. The words “his creditors,” in the clause of the 9th Section of the Act of June 22, 1874, in regard to cases of voluntary bankruptcy, may very properly be referred to the class just previously defined in the section as the creditors of whom the section is speaking, and of whom alone it speaks as creditors concerned where requirements to a discharge are being prescribed, namely, creditors to whom the debtor is liable as principal debtor, and who have proved their claims. They alone are treated as creditors, and as “his creditors.” They alone are treated as creditors in computing the thirty per cent. in assets, and they alone could have been intended to be treated as creditors in computing the assent of the one-fourth in number and one-third in value. If this be not so, the provision as to assent would, in numerous cases, be more onerous than it was before; for it would, in numerous cases, require the assent of more creditors to make up one-fourth in number and one-third in value of all the creditors of the debtor than it did previously to make up a majority in number and value of creditors to whom the debtor had become liable as principal debtor, and who had proved their claims.

I remarked in *In re Francke* (10 N. B. R., 438), that in regard to involuntary cases commenced after the passage of the Act of 1874, the bringing of the petition, which was required to be brought by one-fourth in number and one-third

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in value of the creditors of the debtor, seemed to be regarded, under the 9th Section of that act, as the assent of such one-fourth in number and one-third in value, to the discharge of the debtor; but that in regard to the case of a voluntary petitioner, commenced after the passage of the Act of 1874, the assent required thereby seemed to be prescribed with a view of placing the bankrupt on the same footing, as to the action of creditors, with the bankrupt in involuntary cases. This suggestion does not require that one-fourth in number and one-third in value of all the creditors should sign the assent, in like manner as one-fourth in number and one-third in value of all the creditors must unite in an involuntary petition. For, as has been seen, the policy of the statutes has been, in respect to a percentage in assets, and an assent of creditors, always to deal only with the creditors who have proved their debts. At the time a petition in involuntary bankruptcy is filed, nothing less than the whole body of creditors who may thereafter choose to prove their debts can be regarded as constituting the creditors of the bankrupt. But, at the succeeding stages of the case, those only who have proved their debts are, for very many essential purposes, taken notice of as being the creditors of the bankrupt. Thus those alone who have proved their debts can vote in the choice of assignee or trustee, or share in the distribution of the estate. Those who do not prove their debts are regarded as having elected not to be considered as creditors so far as the proceedings in bankruptcy are concerned. In analogy to this, only those who have proved their debts are taken account of in computing the percentage in assets, or the proportion required to assent to a discharge.

I have met with no decision on the point above considered. In *In re Griffiths*, 10 N. B. R., 456, Judge Lowell alludes to the question whether the assent referred to in the new statute "is that of the given number and value of all creditors who have proved their debts, or only those to whom the bankrupt is liable as principal debtor," and speaks of it as a question which may arise in voluntary cases, and as a difficult

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question. The point was not before him for decision, as the case he was considering was a compulsory case. He seems to regard the expression, "his creditors," as including only creditors who have proved their debts, and indicates that the question may be as to whether it is not also limited to all creditors who have proved their debts, to whom the bankrupt is liable as principal debtor. I see no evidence that Congress intended to vary the principle adopted in 1868. By the original Act of 1867, the assent was to be the assent of a majority in number and value of the creditors who had proved their debts. In 1868, this was changed to the assent of a majority in number and value of the creditors to whom the debtor had become liable as principal debtor, and who had proved their claims. This continued to be the rule when the Act of 1874 was passed. I see nothing in that act but a change of the proportion, from a majority in number and value to one-fourth in number and one-third in value, leaving the proportion still to be calculated upon the creditors to whom the debtor has become liable as principal debtor, and who have proved their claims.

These conclusions are in harmony with those at which I arrived in the case of *In re Sheldon*, 12 N. B. R., 63, when considering the question as to whether the provisions of Section 9 of the Act of 1874, as to discharges in voluntary bankruptcy, apply to debts contracted prior to January 1, 1869.

It results that the bankrupt is entitled to a discharge.

UNITED STATES CIRCUIT COURT—N. D. FLORIDA.

Under the Constitution of Florida, the debtor's shop, store, or mill, in which he pursues his usual trade or avocation, as well as the farmer's farm, if connected with and adjacent to his dwelling, is included in his homestead.

In Florida a lumber-man running a saw-mill cannot claim those portions of the land adjacent to his dwelling which are not auxiliary to his homestead.

*J. C. GREELEY, Assignee of JOSEPH W. SCOTT, v.
JOSEPH W. SCOTT and Wife et al.*

BRADLEY, J.—The assignee in this case filed the bill to

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prevent the debtor and his wife from setting up the right of homestead to a certain tract of land in the neighborhood of Jacksonville, which they claim as such. The whole tract consists of about forty acres in an unincorporated suburb called East Jacksonville, much of which has been laid out into building lots, and on which the bankrupt resides and has a steam saw-mill, which he has operated for many years as his principal business.

The Constitution of Florida, adopted in 1868, reserves to every head of a family residing in the State, and to his heirs, his homestead and one thousand dollars worth of personal property, free from the claims of creditors. If not in an incorporated city or town it may be a homestead to the extent of one hundred and sixty acres of land; if in such city or town, half an acre without any limit as to value. The reservation, however, is only that of the homestead, and embraces no more, although the party may own more within the prescribed limit of quantity. It is very material, therefore, to know what is meant by and embraced in a homestead. Within the meaning of the Constitution of Florida, however it may be elsewhere, it certainly embraces more than a house for shelter; for it may extend to one hundred and sixty acres of land, which could never be needed for that purpose alone. As one hundred and sixty acres is the usual quantity for a farm in the country, the policy of the Constitution seems to be, to allow a man such quantity of land with his house, as he is accustomed to use therewith in the pursuit of his occupation. In other words, the object seems to be, not only to preserve to the unfortunate debtor his house for shelter, but his usual means of employment by which to earn his livelihood, and support his family. The State as well as the individual himself is interested in his labor and industry; and, therefore, takes care that he shall not be deprived of the power to employ them.

In the case of a farmer, therefore, it is clear that the exemption embraces his house and farm, not exceeding the amount limited; of course it includes (and so the Constitution

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declares) the improvements thereon. Those improvements, however, must be such as to make them properly a part of the homestead, such as outhouses, barns, sheds, wagon-houses, fences, etc. They would not embrace tenant-houses, though built on the farm, for these would be no proper part of the farm-homestead. They contain capital separately invested. They produce a revenue of their own distinct from that of the farm.

For the same reason the farmer's homestead would not include a saw-mill, or a grist-mill, or a carding and fulling-mill, though erected on a portion of the tract of which the farm is a part. These are separate enterprises in which the farmer has been enabled to invest his surplus capital. They are no part of the farm. If he runs it he does it as a separate business from that of his farm, and he cannot claim both as appurtenant to and part of his homestead. They constitute the basis of outside and separate industries. A mill-owner, in like manner, may have a farm attached to his mill, and work it as a separate and secondary business. He may claim his mill as part of his homestead, but not the former also, otherwise, by multiplying his branches of business and trade a man might have a large domain, consisting of many establishments, and claim them all as incident to his homestead. This never could have been the intent of the Constitution. It would be an unreasonable construction of its terms. Those terms must be fairly construed so as to fully carry out the policy of the Constitution, and yet not to nullify all obligations of a debtor to pay his debts. That the preservation of a householder's means of carrying on his business, as well as a house for shelter, is within the constitutional purpose is evident from the clause relating to city property, namely, that in a city or town the exemption shall not extend to more improvement or buildings than the residence and business house of the owner, showing that the business house as well as residence is included.

But whilst the cases which we have supposed are comparatively easy of solution, a great many others will arise pre-

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senting greater difficulty and embarrassment. The amount of property which the necessary interpretation of the exemption will sometimes embrace will undoubtedly appear as a great hardship and injustice to creditors. It is a great stride from that state of things in which the sanctity of a debt induced the Legislature not only to take from the debtor all his property, but even his liberty itself. It may be a question whether it is not carrying the principle of exemption too far for the public welfare. It is true that the farmer without his farm, the blacksmith without his forge, the miller without his mill, the trader or business man without his shop, in fine, any citizen without his place to work and labor, or pursue his ordinary calling, is deprived of the power to support himself and his family, and becomes a burden instead of a help to the community. These establishments or places of labor or occupation are respectively adjuncts of a man's homestead, and within the intent and meaning of the Constitution of Florida, form a part of it. Whether the provision is politic or impolitic is a question with which the courts are not concerned. In the eye of the philosophic economist, taking a broad view of the interests and objects of human society, it has many reasons in its favor ; and the creditor cannot complain of injustice, for he understands the conditions when he gives the credit. It is a pure question of policy, namely : whether the advantages obtained by the exemption are equivalent to the disadvantage arising from the unwillingness of capital to remain in a community where such an exemption exists ; or whether from the latter cause the law will not operate too depressingly upon enterprise. Speculation, however, is unnecessary. The people of the State of Florida have, in their Constitution, declared what their will is on this subject, and that declaration is binding on both the people and the courts.

In the case under consideration the debtor claims to follow the business and trade of sawing lumber, and asks to have his mill, which adjoins his dwelling, reserved as a part of his homestead. In our opinion this claim is supported by

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the constitutional provision. The mill in the sense of that Constitution is appurtenant to, and part of the debtor's homestead. If it be objected that the value is unreasonably great, we answer that the Constitution prescribes no limit of value, and the courts cannot prescribe one. As before stated, we think that a man's shop, store, or mill, in which he pursues his usual trade or avocation (as well as the farmer's farm), if connected with and adjacent to his dwelling, is intended to be included in his homestead. It is the stand, or place on which and by means of which he may continue to pursue his industrial labor, and be a useful citizen, and is within the object which the Constitution has in view.

But the debtor cannot ask to retain those portions of the forty acre tract which are not auxiliary to his homestead, considered as the homestead of a lumberman running a saw-mill.

Those portions will be for the assignee, under the direction of the District Court, to separate from the rest. Under the circumstances we do not think the debtor has pursued such a course as to throw undue embarrassment in the way of the assignee, which need to be removed by the interference of a Court of Equity. The main thing which he claims, the saw-mill, we think he is entitled to claim, unless there is some foundation for the allegation of the bill that debts to a large amount, which have been proved, were incurred for the erection of improvements on the mill, and for labor. As this, however, will be a matter which the District Court can better investigate, when marshaling the assets of the bankrupt estate, and enforcing any liens which particular creditors may have on particular parcels of property, we do not think there is any call for the interposition of this court.

The motion for injunction is denied and the bill dismissed, without costs and without prejudice to the complainant as to any part of the property except the house and saw-mill, and such reasonable extent of land about the same as may be necessary and proper for their enjoyment as a homestead by the debtor and his family, and without prejudice

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as to the effects of debts contracted for improvement and labor.

We do not think that any decree should be made authorizing the assignee to sell the reversion of the homestead, as the Constitution expressly declares that the exemption shall accrue to the heirs of the party having enjoyed or taken the benefit thereof. This, however, is also a question which the District Court can as well decide as this court, and presents no ground for the interference of a Court of Equity.

Bill dismissed.

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UNITED STATES DISTRICT COURT.—N. D. ILLINOIS.

Where a note is given for the premium on an insurance policy containing the provision that if the note is not paid at maturity the policy becomes void while it remains overdue and unpaid, and after the dishonor of the note the vessel insured strands, whereupon the master has the note paid, and afterwards a gale comes up and the vessel is lost, the insurer is not liable.

Though the weather was fair at the time of the stranding, and continued so until after the note was actually paid, yet the proximate cause of the loss was the stranding of the vessel, and under these facts the policy was not revived.

*WILLIAM P. CARDWELL v. THE REPUBLIC FIRE
INS. CO.*

Waite & Clark, for creditor.

Tennys, Flower & Abercrombie, for defendant.

BLODGETT, J.—This is a motion to expunge a claim proved by Wm. P. Cardwell against the estate of the bankrupt.

There is no dispute as to the material facts. The claimant was the owner of the schooner D. O. Dickinson, and a policy in his favor for the season 1869, for the sum of five thousand dollars, was issued by the bankrupt company on the hull, tackle, apparel, and furniture of said schooner, to expire on the 5th of December, 1869. The insured gave the company a note for the premium on this policy, payable on the 8th day of October, 1869, with a condition in the body of

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the note and also in the policy, in these words : " And in case this note is not paid at maturity the full amount of premium shall be considered as earned, and the said policy becomes void, while the note remains overdue and unpaid."

The note was not paid when due, and on the night of the 7th of October said schooner, laden with a cargo of lumber, left the port of Oconto for the port of Chicago, and about two o'clock on the morning of the 8th she ran aground on what is known as Strawberry reef, a sandbar projecting from Chambers' island, near the outlet of Green Bay. No serious damage was done to the schooner by the stranding. Her bows ran hard on to the sand, and although an anchor was at once carried out and efforts made by the crew to work her off, they were unable to move her, owing to the bad holding ground, which was a soft sandy or gravelly bottom.

Finding that he could not get her off by his own efforts, the captain, who was the owner, with the most efficient part of his crew, took the yawl boat and proceeded to Menominee, about thirty miles distant, for a tug, where they arrived about eleven o'clock in the morning. From that point the owner telegraphed to his agent in Chicago to pay the premium note, and the same was paid at half-past eleven o'clock in the forenoon on the 8th of October, without any disclosure to the insurance company of the condition in which the vessel then was. The services of a tug were procured, and the captain, with the tug, returned to the schooner about five o'clock in the evening of the 8th. The captain of the tug found the water too shallow in the vicinity of the schooner to enable him to reach her with his lines and decided to go for a lighter, which he did, leaving the schooner still hard aground. During the 8th, and up to about four o'clock of the morning of the 9th, the weather was pleasant and with no sea running, and the vessel appeared to be in no immediate danger; but about four o'clock in the morning of the 9th a gale came on from the southwest, causing a heavy sea, which broke over the stern of the vessel and finally filled her with water, and before the gale subsided she was a total wreck. The com-

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pany refused to pay the insurance, and suit at law was commenced, but before it could be tried the company was adjudged a bankrupt, and this claim for the amount of the policy and salvage services, in all five thousand five hundred and fourteen dollars and twelve cents, was proven up against the estate of the bankrupt, which the assignee now seeks to have expunged. The defense set up by the assignee is, that at the time the loss occurred the policy had become void by the non-payment of the premium note, and, therefore, the company was not liable.

In *Williams v. A. C. Ins. Co.*, 19 Mich., 451, this clause was construed to simply suspend the policy while the insurance remained unpaid. And if payment of the premium was made before expiration of the policy, it was revived and became again operative; but if the loss occurred during the interval in which the policy remained suspended, the company was not liable, therefor, on the policy. This construction of the intent and meaning of the contract seems to me sound, and was acquiesced in by the counsel on both sides in this case. The material question is, when did the loss occur within the spirit and meaning of the policy? Was it when the vessel stranded on the sand bar in comparatively mild weather, or when she was actually broken in pieces by the gale? Or, in other words, was the vessel lost within the meaning of the contract when the premium note was paid at half-past eleven o'clock on the forenoon of the 8th of October.

It seems to me that the proximate cause of the wreck of the vessel occurred when she stranded on this sandbar. From that time on she was beyond the control of her crew. She was no longer a vessel afloat and capable of being manoeuvred by those in charge of her, but was a helpless and inert mass, incapable of performing the functions of a ship. True, she received no such immediate damage as necessarily involved her destruction, if good weather had continued and help had been obtained; but she was within the jaws of destruction with no power to help herself, and at the mercy of

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the elements ; and when the gale came on it only completed the wreck which had begun with the stranding.

It is conceded by the counsel for the claimant that the policy was suspended and inoperative from the time the note fell due till paid, and, of course, if the loss is to date from the time when she struck on the bar, then the policy was inoperative at the time of the loss.

Claimant's counsel contend that the immediate cause of the loss of the vessel was the gale, which began on the morning of the 9th, insisting that the proof shows that the vessel was not considered in any danger, by her captain or crew, up to that time ; and that the gale and not the stranding, on the morning of the 8th, is to be deemed the proximate cause of the wreck, but, as I have already intimated, I cannot agree with that view of the case. The proximate cause of the wreck, in my opinion, was the stranding, which held the vessel helpless while the gale beat her in pieces. But for the stranding she would have been far beyond that place, and probably at or near the end of her voyage, before this gale came on.

The cases cited from 12 Wall., 194 ; 11 Johns., 13 ; 12 East, 646 ; 2d Bissell, as to what was the proximate cause of loss in those cases, respectively, do not seem to me in point.

The case from 12 Wall., *Ins. Co. v. Trans. Co.*, which seems at first glance the most analogous, was that of a fire risk on the hull of a steamer. A collision occurred by which the steamer was injured so as to let in the water, and owing to the influx of the water she took fire and her upper works burned off so that the rest of the hull sank. It was found, as a fact in the case, that but for the fire, which destroyed the buoyant parts of the hull, she would have floated, notwithstanding the injury from the collision, and the court, therefore, held that the fire was the proximate cause of the loss as against the fire insurance company. So in the case of the tug *Union*, 2 Biss., 18. The learned judge held that the proximate cause of injury to the libellant was his own negli-

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gence in attempting to leap from the tug, and not a collision which had occurred some moments before.

The claim must be expunged.

UNITED STATES CIRCUIT COURT—D. SOUTH CAROLINA.

The filing of a bill for the sale of the property free from incumbrances does not have the effect to give the mortgagee a right to the rents thereafter collected.

The assignee is entitled to the rents of mortgaged property until the mortgagee claims them.

The filing of a petition in court and notice thereof to the assignee is sufficient to entitle the mortgagee to rents thereafter accruing.

In re J. S. K. BENNETT.

WAITE, C. J.—The material facts of this case, as found by the special master, are as follows :

J. S. K. Bennett was adjudicated a bankrupt, October 8, 1872, upon a creditor's petition filed July 31, of the same year. Soon afterwards assignees were elected and qualified. The estate of the bankrupt consisted almost exclusively of twelve parcels of land lying in Charleston, Colleton, Georgetown, and York counties. The South Carolina Loan and Trust Company held a first mortgage upon two of these parcels and the estate of one Payne a similar mortgage upon a third. Subject to these liens, Mrs. Bennett, the mother of the bankrupt, held a mortgage on the twelve parcels. One Sanders had a mortgage behind that of Mrs. Bennett upon the land in York county, and there were several judgment creditors whose judgments constituted liens upon that in Charleston county. The Loan and Trust Company had a suit pending in the State court (to which Mrs. Bennett was a party) for the foreclosure of its mortgage, and the lands in Charleston county were advertised for sale under executions issued at the instance of the judgment-creditors upon their judgments, when the petition in bankruptcy was filed. At that time and for some time afterwards, all parties interested

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believed that the real estate when sold would realize more than enough to satisfy all the incumbrances upon it.

On the 8th of November, 1872, the assignees having taken the real estate into their possession, filed in the District Court their bill in equity against all the lien creditors, setting forth the nature and character of each lien, and the conflicting interests in respect thereto, and asking that the rights of the respective parties might be adjudicated in that suit; that the property might be sold free from all incumbrances, and that further *ex parte* proceedings by the several lien creditors might be enjoined. The injunction asked for was granted, and all the defendants subsequently answered. Mrs. Bennett filed her answer March 1, 1873, in which she asserted the validity of her mortgage, and claimed that "under skillful management the estate of the bankrupt could be made to pay all his debts in full and leave a surplus for the benefit of himself and family." She made no claim to the rents and profits of the land, and did not ask to have them subjected to the payment of her mortgage debt. The several judgment-creditors in their answers attacked the validity of Mrs. Bennett's mortgage. Testimony was taken, and, on the 21st of May, 1873, a decree was entered, with the written consent of all parties, directing a sale of the entire property by the assignees; that the costs be paid out of the proceeds of the sale, and "that the assignees pay all and any taxes, charges, and assessments upon said several premises out of the proceeds of the sale, * * * and likewise apportion and retain the commissions to which they may be properly entitled, and that they hold the surplus subject to the further order of the court." Under this decree the property has been sold, but the proceeds are not sufficient to pay in full the amount due upon the mortgage of Mrs. Bennett.

On the 30th of May, 1873, Mrs. Bennett filed her petition in the District Court, in which she claimed that she was lawfully entitled to receive the rents and profits of the real estate covered by her mortgage from and after the 8th of October, 1872, the date of the adjudication in bankruptcy

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A rule was thereupon made upon the assignees to show cause why the rents and profits received by them, after deducting any amount due for taxes, should not be paid to her, and why they should not account to her for rents and profits which they might thereafter collect. To this rule the assignees made a return. The whole case was then referred to Samuel Lord, jr., as special master, "to inquire and report what costs, expenses, and counsel fees are due and unpaid, in the matter of the bankrupt's estate, whether general or special; and further, to report out of what funds in the hands of the assignees the same should be paid; with leave to report any special matter."

The master reported that the rents and profits which had been received by the assignees after November 8, 1872, the date of the filing of the bill to adjust the rights and priorities of the lien creditors, belonged to Mrs. Bennett, and could not be applied to the payment of any other counsel fees and expenses than such as were incurred for the benefit of that fund.

To this part of the report the assignees excepted. The District Court sustained the exception, and held that all the rents and profits collected by the assignees, were assets in their hands for the payment of the general creditors and not part of the mortgage security.

The case is now here to obtain a review of this ruling of the District Court.

By an act of the General Assembly of South Carolina, passed in 1791 (5 Stat., 170), it was provided as follows:

"SEC. 2. That no mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time allotted for the payment of the money secured by the mortgage had elapsed; but the mortgagor shall still be deemed the owner of the land, and the mortgagee the owner of the money lent or due, and shall be entitled to recover satisfaction of the same out of the land in the manner above set forth (Section 1), Provided, always, that

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nothing herein contained shall extend to any suit or action now pending or when the mortgagor shall be out of possession." (Rev. Stat., c. 116, Section 1, p. 536.)

Under this statute it has been held, that when the mortgagor is "out of possession," the rights and remedies of a mortgagee are the same as at common law, and that he is "out of possession" when he has made an absolute conveyance of the mortgaged property in fee and his grantee has gone into possession. (*Durand v. Isaacks*, 4 McCord, 54; *Stoney v. Shultz*, 1 Hill Ch., 465; *Matthews v. Preston*, 6 Rich. Eq., 307; *Mitchell v. Bogan*, 11 Rich. Law, 686; *Laffan v. Kennedy*, 15 Rich. Law, 246. In the case last cited, "the court holds that when there is a mortgage in fee, the mortgagor, whilst he retains the fee, is not deprived of the ownership of the land and the rights incident thereto by the temporary occupation of a tenant who holds under him." This goes as far as any case has gone in limiting the operation of the words of the act, and by the strongest implication concedes that if the fee is conveyed the required possession is gone.

The assignment in this case, under the operation of the Bankrupt Act, transferred the fee to the assignees. Bennett had no longer any estate in the mortgaged property. Whatever right he had was then absolutely conveyed and his grantees went into possession, not as his tenants, but as owners. It is true that this conveyance may not have been voluntary, and that in one sense it was by operation of law, but it is equally true that its effect was to divest the mortgagor of his title and possession and place them both in the assignees. This is the legal effect of the adjudication of bankruptcy, the appointment and qualification of the assignees, and the official assignment by the register or judge. It is a conveyance by the bankrupt in the same sense that the deed of a sheriff after judgment, execution, levy, and sale by him is a conveyance by the judgment-debtor. In the one case, the register or judge, and in the other the sheriff, is made by law the agent of the owner to convey.

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When, therefore, the assignment was made, the bankrupt mortgagor was "out of possession," and Mrs. Bennett became invested with all the rights and powers of a mortgagee at common law. As such, she could obtain the possession of the mortgaged property by an appropriate possessory action at law, or subject the accruing rents and profits of the land to the payment of her mortgage by a proceeding in equity. She could also, upon proper demand and notice, require tenants in possession to pay their rent to her, but she could not bring the mortgagor or his assignees to an account for profits arising from their own use and occupation, or for rents actually received by them from their tenants before entry was made or demand and notice given. These are familiar principles both in and out of South Carolina (*Mathews v. Preston*, *supra*; *Ex-parte Wilson*, 2 Ves. & Beames, 252), and it was conceded by the counsel for the assignees upon the argument, that they are applicable to this case, if the parties occupy the position towards each other of mortgagor and mortgagee at common law. The theory is, that until the mortgagee actually intervenes to assert his right to the profits of the land, they may be rightfully received and appropriated by the mortgagor and those to whom he assigns. The unqualified assent by the mortgagee to the possession by the mortgagor or holder of the equity of redemption is equivalent to a license to occupy and to enjoy all the benefits of the occupation. Until this license is revoked, the possession is lawful, and he who is under it cannot be charged as a wrong-doer. It is for this reason that, according to the weight of authority, a recovery of the possession by the mortgagee from the mortgagor, or one holding under him in ejectment, only carries with it the right to recover mesne profits from the time of notice by the mortgagee to quit, or in the absence of such notice or its equivalent, from the time of the commencement of the action of ejectment. (*Sanderson v. Price*, 1 Zab., 637; *Notes to Moss v. Gallimore*, 1 Smith's Lead. Cases, 315-318.) Possession with the consent of the mortgagee is not wrongful, and dam-

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ages for detention cannot be recovered until such consent has been in some form withdrawn.

It remains only to apply these principles to the facts of the present case. Mrs. Bennett, having become by the operation of the assignment, a mortgagee at common law, and the assignees being only the owners of an equity of redemption after condition broken, had the right to proceed at once to subject the accruing rents and profits of the land to the payment of her debt. For this purpose all the remedies known to the law in such cases were open to her. This right was one of the incidents of her mortgage. She might exercise it or not as she chose. If she lay by and without objection permitted the owner of the equity of redemption to appropriate the profits of the land to his own use, her power over such as he appropriated was gone. Until she acted her right was dormant. It only had effect when it was exercised.

The assignee in bankruptcy is especially the representative of the unsecured or general creditors. He is not the agent or representative of secured creditors who do not in some form make themselves parties to the bankruptcy proceedings. He cannot deprive a secured creditor of the benefit of his security, neither is it any part of his duty to enforce the security rights of such a creditor. To charge him as the agent or representative of such a creditor for such a purpose, it must in some form appear that he has been specially required to perform that duty.

When the assignees took possession of these lands, they took it for the benefit of the general or unsecured creditors. They had become the owners of the equity of redemption of a mortgagor in possession. They succeeded to the rights of such an owner and became entitled to all the benefits and advantages of such a possession. This gave them the right to receive and appropriate, without liability to account, the rents and profits of the land until such time as the mortgagee made claim to them under her mortgage. When so collected they at that time inured to the benefit of the unse-

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cured creditors. The possession of the assignees was then in no sense that of the mortgagee. It was that of a mortgagor with the assent of the mortgagee.

It seems clear, therefore, that Mrs. Bennett is not entitled to the rents collected before the time of the filing of the bill by the assignees to adjust the rights of the lien creditors. They were received by and for the owners of the equity redemption without objection from her as mortgagee.

It does not appear from anything in the case, as it is presented, that the ownership of the rents and profits was in any manner brought to the consideration of the court under the bill filed by the assignees, or that the collections made pending that litigation were by virtue of any authority derived from that suit.

The assignees, being rightfully in possession, asked to have the rights of the several parties adjudicated and the lands sold. They did not surrender the possession or control of the land to the mortgagee or the court, neither did they ask the court to determine who should be entitled to the rents collected during the pendency of the litigation. All parties interested were called in, and while they were enjoined from commencing any other suit for the adjudication of their rights, there was nothing to prevent them from presenting all their claims and having them adjudicated in that. Mrs. Bennett could not commence a possessory action, and thus avail herself of the use of the land, but she could assert in that suit her right to the accruing rents and have them adjudicated to her. This she did not do, but permitted the assignees without objection to continue in the enjoyment of all the advantages which resulted from their possession with her consent.

The decree ordered a sale of the lands, but did not adjudge the rents to the mortgagee. The case is no different in effect from what it would have been if Mrs. Bennett had filed her bill against the assignees in possession to foreclose her mortgage and neglected to take the necessary steps to reach the rents pending the litigation. It matters not that

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she was required by the assignees to assert her rights, for when she did come in and did present her claim she became an actor, and was entitled to the same relief she would have had if she had herself originally instituted the suit. In *Boyce v. Boyce*, 6 Rich. Eq., 302, which is supposed to give her the rents collected pending the litigation, the fund did not come into the hands of the administrator until after the mortgagee had asserted his claim to it in a suit where the administrator brought the whole of an insolvent decedent's estate into court and called upon all creditors and claimants to present their demands and have the order of their payment adjudicated. It presented, therefore, a case in which an attempt was made to reach rents and profits before they had come into the possession of the mortgagor.

For these reasons, I am clearly of the opinion that the bill filed by the assignees, and the proceedings under it, did not have the effect of subjecting the rents thereafter collected to the satisfaction of Mrs. Bennett's mortgage. But on the 30th of May, 1873, she did file in the Bankrupt Court a formal demand, and asserted her right to have the rents applied upon her mortgage. According to *Matthews v. Preston*, 6 Rich. Eq., 307, at common law "the implied authority of the mortgagor to receive and appropriate the rents and profits might be terminated at the will of the mortgagee. He had only to notify the tenant of his mortgage and demand the payment of the rent to himself (both as to that which is in arrear as to that which is to accrue), to render any subsequent payment to the mortgagor illegal. After such notice, the mortgagee might maintain his action at law for the rent, or he might resort to the more summary proceeding by distress under the law of landlord and tenant."

The assignees in bankruptcy administer the estate of the bankrupt as officers of the court. The court in effect takes the property into its own possession and holds it for the creditors and claimants according to their respective rights. Until Mrs. Bennett asserted her claim to the rents the possession in this case was for the general creditors, who were

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the beneficial owners of the equity of redemption, and the rents when collected followed this ownership. The general creditors occupied the position of owners of the equity of redemption in possession with the consent of the mortgagee. But when Mrs. Bennett demanded the rents this consent on her part was withdrawn, and, under the ruling in *Matthews v. Preston*, the further payment to the general creditors or for their account became illegal. Thenceforward the court held and received for her account, not theirs.

There was no necessity for the appointment of a receiver, because in legal effect the assignees already occupied that position. They were acting for the benefit of whom it might concern. They received and held the rents for such persons as should for the time being be entitled thereto. According to *Matthews v. Preston*, a mere notice to a tenant and demand of the rent terminated the authority of the mortgagor to receive and appropriate, and at the same time transferred the ownership to the mortgagee. In order to put an end to the authority of a mortgagee to collect the rents, it is only necessary for the mortgagor to manifest his intention so to do. For this purpose, according to *Bank of Washington v. Hupp*, 10 Gratt., 23, "slight acts will be deemed sufficient;" and in *Boyce v. Boyce*, where, as here, the mortgaged property was in court, a claim for the rents made to the court by a party to the suit in the progress of the cause was all that was required. As the court has the property and the parties all within its jurisdiction, it has the power to adjudicate upon all conflicting claims.

I am, therefore, of the opinion that the rents collected after May 30, 1873, are applicable to the payment of any balance that may remain due upon the mortgage of Mrs. Bennett after exhausting the proceeds of the sale of the land, and that the order of the District Court must be modified accordingly.

Mrs. Bennett asks that the taxes upon the lands due previous to May 30 be paid out of the rents collected before that time. That question is not now open, inasmuch as by

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the decree of May 21, entered by the consent of all parties, it was ordered that the taxes be paid from the proceeds of the sale of the lands. The report of the special master is in all respects affirmed, except as hereinbefore indicated.

UNITED STATES DISTRICT COURT—D. KENTUCKY.

In the absence of fraud joint debts may be converted into individual debts by one partner's undertaking for a good consideration to pay them. If the partners, more than four months before the commencement of the proceedings in bankruptcy, transferred all their property, both separate and joint, to one partner, who undertook to pay the firm debts, all the assets will be treated as the separate assets of that partner. A promise by one partner to pay all the firm debts may be enforced by the firm creditors, although they were not cognizant of the promise when made, and although the consideration did not move from them. If there is no joint estate, the firm creditors may share *pari passu* in the separate estate.

In re COLLIER, TAYLOR & CO.

AT Russellville, in the County of Logan, State of Kentucky, on the 25th day of November, 1874, before Wilbur F. Browder, Register.

REGISTER'S OPINION.

A question having arisen, in the course of the proceedings in this cause, as to what debts were properly chargeable to the assets of the firm, and what to the assets of the separate members thereof, the assignee called a meeting of all the creditors, which meeting was accordingly held in the courthouse at Franklin, Ky., on the 28th day of March, 1874. It was unanimously resolved by this body that W. W. Bush, Esq., and Geo. C. Harris, Esq., were empowered and directed to "reduce to writing an agreed statement of facts" touching the issue above-mentioned. These gentlemen have executed this commission, and from the carefully-prepared statement and exhibits filed by them it appears that the copartnership of Collier, Taylor & Co., now bankrupts, was organized and went into operation in 1868, and conducted its business in

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Franklin, Ky., and elsewhere ; that this company was composed of J. A. Taylor, Wm. F. Collier, and R. H. Collier ; that it was an equal partnership, each member owning one-third thereof ; that this firm continued its business operations until the 14th day of February, 1873, on which day it was by mutual consent dissolved. Prior to the dissolution, however, the partners had caused an invoice to be taken, from which it appeared that the liabilities of the concern exceeded its assets forty-six thousand four hundred and seventy dollars and twenty-four cents. W. F. and R. H. Collier owned very little property compared with the estate owned by their copartner, J. A. Taylor, which latter estate was of considerable size and value. The balance-sheet struck as hereinbefore-mentioned showed that the three partners, as between themselves, stood thus : in order to equalize them W. F. Collier would have to pay twenty thousand one hundred and fifty-seven dollars and thirty-nine cents ; R. H. Collier would have to pay seventeen thousand and eight dollars and seventy-nine cents : J. A. Taylor would have to pay nine thousand three hundred and four dollars and six cents. In view of these facts it was agreed by and between the partners to dissolve the copartnership, and, further, that W. F. and R. H. Collier should transfer and convey to their copartner, J. A. Taylor, their undivided interest in and to the partnership property, and to transfer and convey to him all their separate property, personal, real and mixed, in order to help him the better to bear the losses. To this arrangement Taylor assented, and in consideration thereof agreed to assume and pay off the firm debts, stipulating, nevertheless, that the two retiring partners should account to him for their respective shares of the joint liabilities outstanding, after having credited them by the value of the property conveyed by them to him as aforesaid. On the 13th day of February, 1873, pursuant to this agreement, R. H. Collier and wife conveyed to Taylor all the real estate owned by R. H. The consideration expressed in the deed is thus set forth, "for and in consideration of five thousand dollars, to be credited on R. H.

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Collier's indebtedness to Collier, Munday & Taylor and Collier, Taylor & Co."

On the same day W. F. Collier and wife conveyed to J. A. Taylor all the real estate owned by said W. F. in consideration of said W. F. Collier's indebtedness to Collier, Taylor & Co.

On the same day R. H. Collier and wife and W. F. Collier and wife conveyed to J. A. Taylor all their joint interest in and to the real estate owned by said R. H. and W. F. Collier as joint tenants and otherwise, in consideration of their indebtedness to Collier, Taylor & Co.

On the 14th day of February, 1873, the partners, W. F. Collier, R. H. Collier, and J. A. Taylor, executed an instrument of writing, reciting (1) a settlement of all the partnership matters as between themselves; (2) an indebtedness of \$——, due by W. F. Collier to J. A. Taylor on said settlement; (3) an indebtedness of \$——, due by R. H. Collier to J. A. Taylor on said settlement; (4) the existence of outstanding liabilities of the firm of Collier, Taylor & Co; (5) a dissolution of said copartnership; (6) an absolute sale and transfer by said W. F. and R. H. Collier to said Taylor of all the notes, accounts, assets, and property of all kinds belonging to Collier, Taylor & Co. This agreement also prohibits the use of said firm name thereafter for any purpose, except its necessary use by Taylor in winding up its affairs.

The foregoing deeds and instruments were, immediately upon their execution, duly acknowledged and lodged for record and recorded in the office of the clerk of the Simpson County Court.

In none of these deeds do the grantors limit or restrict Taylor in the use or application to be made by him of any of the property, real or personal, conveyed by them to him. The only intimation on this subject found in any of the four conveyances is contained in the deed from R. H. Collier and wife, in which the grantor states that the property so aliened is to be used by Taylor in payment of the debts of the late

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firm, and that said Collier is to be credited by the proceeds of the sale thereof on his indebtedness to J. A. Taylor. With this exception these deeds are, on their face, absolute and unconditional.

On the said 14th day of February, 1873, J. A. Taylor entered upon and assumed charge of all the property thus conveyed to him, and exercised acts of ownership over the same. On said day Taylor issued printed invitations, addressed to all the creditors (1) of himself, (2) of Collier, Taylor & Co., and (3) of Collier, Mundy & Taylor, requesting them to meet him on the 20th day of February, 1873, in Franklin, Ky. In this general notice, mailed to the creditors, he asserts his ownership of all the joint and separate property hereinbefore alluded to; his assumption of all the partnership debts, and his willingness and ability to pay them all in full. In response to this invitation a large number of the creditors, joint and individual, assembled at the appointed time and place. Taylor stated to this meeting all the facts hereinbefore specified, and told the creditors that they must "look to him for satisfaction of their debts," and asked them to propose some policy by which he should be guided in accomplishing the desired results. He submitted an elaborate statement of his financial condition, showing a surplus of assets over and above the liabilities, amounting to fourteen thousand one hundred and ninety-two dollars and thirty-six cents. This meeting adjourned without any definite action, merely suggesting that Taylor should execute a deed of assignment to trustees for the benefit of creditors, but dispersing without carrying this idea into effect. From and after February 14, 1873, Taylor took possession, as before stated, of all the estate transferred to him, and treated all as his separate property, attempted to wind up his affairs, sold one item of joint property, and collected, including this sale, about five hundred dollars of the joint assets. This money was so mingled with his own that no definite history of its application can be ascertained. He applied part of it to the payment of a premium on a policy of life insurance, and does

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not account for the residue. This course was continued until May 13, 1873, on which day J. A. Taylor executed to G. W. Dickey and W. C. Montague a deed of assignment in trust for the benefit of the creditors afore-mentioned, making no distinction whatever between the joint and separate classes—desiring them all to be treated equally and alike. By this deed all the property owned by Taylor, embracing the real and personal property conveyed by W. F. and R. H. Collier, was transferred to Montague and Dickey, who accepted the trust, in writing indorsed on said deed. The deed and acceptance were duly acknowledged and recorded in the proper office. Taylor uses these words in this assignment: "It being my desire to make no distinction or difference between any of my creditors, but treat them all alike and equally in accordance with their priority, etc."

The trustees executed no bond, but entered at once upon the discharge of their duties, and continued to act under the authority conferred in the deed up to the 15th day of August, 1873, on which day Page & Co., petitioning creditors, filed a petition in this court against the firm of Collier, Taylor & Co., praying that said firm be adjudged bankrupt, on which petition they were in due time adjudicated bankrupts, an assignee was duly elected and received a complete surrender from Montague and Dickey of all the property and effects belonging to said copartnership and the separate members thereof.

It is admitted by counsel that at the date of the dissolution of the firm the estimated value of the assets of the partnership and its members was as follows:

J. A. Taylor's separate estate.....	\$50,000
W. F. Collier's separate estate.....	3,000
R. H. Collier's separate estate.....	2,000
Collier, Taylor & Co.'s estate.....	10,000
Total valuation.....	<u>\$65,000</u>

From February 14, 1873, until the 15th day of August,

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1873—the date of the deed of assignment of the bankrupts' effects to the assignee—the title to all the foregoing property was vested in J. A. Taylor and Montague and Dickey, trustees, and from the record there appears to have been, and is no other property, joint or separate.

The debts proven against the estate of the company and the separate members thereof are as follows :

Against Collier, Taylor & Co.....	\$58,290	21
“ J. A. Taylor.....	28,449	47
“ Wm. F. Collier.....	281	44
“ R. H. Collier.....	127	40

On the foregoing facts the following questions of law arise :

First. Shall the joint and separate creditors share *pari passu* in the distribution of the assets of the estate? or,

Shall the joint and separate assets be treated as the individual estate of Taylor, and the joint and separate creditors be treated as his individual creditors in said distribution?

Second. Do the facts in this cause warrant the application of the rule contained in the 36th Section of the Bankrupt Act?

Third. Were the conveyances by W. F. Collier and R. H. Collier to J. A. Taylor fraudulent, and are they subject to review and rescission in this special proceeding?

Fourth. Was the voluntary promise by J. A. Taylor to pay all the firm debts binding on him, and is it enforceable in this proceeding?

There is really but one question involved, and in stating it in the foregoing forms the object is to give prominence to the leading features of the inquiry. It is conceded that Section 36 of the Act of March 2, 1867, commonly styled the Bankruptcy Act, is simply declaratory of the formerly-established rule in equity. It is no innovation, but merely an expression, in peculiarly felicitous language, of the ancient equity practice of marshaling and distributing assets. It is

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equally true that the system of bankruptcy organized under the aforesaid act is mainly a system of equity jurisprudence, and that proceedings in bankruptcy are proceedings in equity. So that the matters involved in this controversy are to be determined by the rules and practice obtaining in chancery courts. The 36th Section affords no field for discussion, and the issue raised is not a construction of this section, but whether the assets in the hands of the assignees shall be distributed according to the rule prescribed therein. We are confronted at the outset by the fact that Collier, Taylor & Co., as a copartnership, were proceeded against in bankruptcy and were adjudicated bankrupts under this particular section of the act; that the court obtained jurisdiction over them by the operation of this section, and that all the proceedings heretofore have been conducted according to its provisions. Some of the parties to this action, and the very parties, too, who instituted these proceedings against the firm by invoking this section, are now seeking to evade its provisions in the distribution of the assets of the estate. In the first place, was it necessary to proceed against the company under this section? Was there in existence on the 15th day of August, 1873, such a community of interest and such a community of indebtedness as justified proceedings against W. F. Collier, R. H. Collier and J. A. Taylor as partners doing business under the firm name of Collier, Taylor & Co.? We think not. This copartnership was dissolved by consent February 14, 1873, the two Colliers retiring, and at the same time conveying to their copartner, J. A. Taylor, all their joint and separate estates and effects. This was legitimate, and, in the absence of fraud, conclusive against all the world. They received good and sufficient considerations in exchange for the property transferred. None of their creditors have assailed these conveyances, nor do they appear in this special proceeding to object. The copartnership creditors have not attacked these transfers, but on the contrary insist upon upholding them. Notwithstanding this, the separate creditors of J. A. Taylor, whose

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ability to pay was thereby enhanced, insist that these conveyances are in derogation of their rights and should be treated as null and void. This pretension is too impalpable for further pursuit. If Taylor, who owned a large estate, had conveyed his property to the retiring partners, then perhaps some reason might appear justifying the opposition thereto by his separate creditors, but if any one is aggrieved by his receiving an additional fund with which to pay, it is certainly not his individual creditor. It is a well-settled rule that partners can convert joint property into separate property by transfers to a copartner, and it follows as a corollary that joint debts may be converted into individual debts by one partner's undertaking their payment. Of course fraud vitiates every transaction, and the absence of fraudulent intent is a condition to be annexed to the foregoing proposition. It is error to say that partnership creditors have a *lien* on joint property, and separate creditors have a *lien* on individual property. While equity treats these two classes as holding preferences, and awards to them the priorities laid down in Section 36 before mentioned, there is no principle of practice with which I am familiar under which a lien, as recognized by courts of chancery, can be enforced in such cases. This is clearly illustrated by the fact that if A and B are partners, owing firm debts, and each owing separate debts, and while these debts are outstanding, execute a joint note, which A indorses as surety, and the firm afterwards becomes insolvent, the separate creditors of A could certainly claim no preference, to the exclusion of the partnership creditor to whom A was bound as surety. If a lien existed on A's separate estate in favor of his separate creditors, whose debts were contracted before his indorsement of the firm paper, then it would be competent for them to claim and receive satisfaction in full before the joint creditor could collect his debt out of his separate estate. And this on the principle that the separate creditors were mortgagees holding his separate estate under a valid lien of mortgage. These classes only hold debts, which, by reason of the fact that one class

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trusted on the strength of individual estate, and the other contracted, primarily, on the strength of joint property, ought in equity to be paid out of the funds which originally received the credit; and to this extent, and no further, in our opinion, are these classes lien-holders.

In this case no actual or presumptive fraud appears upon the facts submitted. Indeed, it is clear that the utmost good faith prevailed during the entire period of gradual decay. Taylor, up to the date of his assignment to trustees, May 13, 1873, apparently believed that he would be able to pay all the debts in full and have a surplus of fourteen thousand dollars, or thereabouts. But assuming that there was fraud intended by the transfers of February 13 and 14, 1873, can it be reached in this proceeding? No one has yet attempted to vacate or set aside any of these conveyances. If the creditors desired to annul these transfers they should have proceeded within six months from the date of their execution, if they invoked the courts of the commonwealth, or within four months, if by proceedings in bankruptcy. They have done neither, and it seems to us that inasmuch as the title to this property is now in the assignee, holding directly under J. A. Taylor, through the medium of an assignment executed by an officer of this court, that the proceeds of the sale of this property must follow the title, and can only be divested by a diversion of the title. The fact of the assignee's being one person, in whom the titles all, irrespective of their previous lodgment, must vest, can make no difference, as he is expressly directed by the act to keep the estates distinct and separate, as well from the funds of one partner as from his own private funds. It results from the foregoing that, in our judgment, all the assets in the hands of the assignee, whether on account of J. A. Taylor, or W. F. Collier, or R. H. Collier, or Collier, Taylor & Co. are to be held and treated as the separate assets of J. A. Taylor alone; that at the date of the commencement of these proceedings there was no co-partnership and no joint estate. This opinion is strengthened by the absolute and unconditional terms of all the con-

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veyances made to Taylor, February 14th, by his late partners. Only one of these deeds expresses an intimation as to the object sought by the parties, and it virtually impairs the force of the intimation by stating that the grantor is to have credit by the proceeds of the sale of the property so transferred, on a settlement with J. A. Taylor. These deeds were not, on their face, trust deeds; nor does the conduct of the parties before and after their execution raise any reasonable presumption that they were so intended. They were made to reimburse Taylor, in part, for the large indebtedness which he was by law bound to pay.

Taylor's assumption of all the partnership debts is the next step in this inquiry. It is now an elementary principle that the promise by one to another for the benefit of a third is binding and enforceable by and in the name of the third party. No principle is more deeply rooted in the American system of jurisprudence than this familiar rule. This doctrine is tenable, it seems, even where the beneficiary was not cognizant of the promise when made, and although the consideration did not move from him. To apply this rule to the case in hearing is perceptibly easy. Taylor, in consideration of certain transfers of property to him, agreed with the two retiring partners, to pay all the debts owing by the firm of Collier, Taylor & Co. By this promise he is bound, and the joint creditors can enforce it against him or claim the benefit of it, either before or after the bankruptcy of their debtor. The general promise of Taylor to pay all outstanding firm liabilities is as much a contract, and is to be treated with as much solemnity as though he had, in writing, indorsed his guaranty on the back of every existing obligation of the co-partnership. In a case similar to this, *In re William Downing*, 3 N. B. R., 741, Judge Dillon uses this language, in reference to the creditors of the firm, "I look upon their rights in equity as being the same as if Downing had indorsed the pre-existing firm paper, in which case they could have proved their debts against either, if not both the firm and Downing."

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It follows from the foregoing that, in our judgment, all the assets should be treated as the separate property of Taylor, and all the creditors should share *pari passu* in the dividends arising therefrom. This conclusion has been reached after a careful study of the 19th, 27th, 32d, 33d, 34th and 36th Sections of the Bankruptcy Act, and the following leading cases, to wit: *In re William Downing*, 3 N. B. R., 741; *in re Goedde & Co.*, 6 N. B. R., 295; *In re Geo. Rice*, 9 N. B. R., 373; *In re Knight*, 8 N. B. R., 436; *In re Owen Byrne*, 1 N. B. R., 464; *Blacks' Appeal*, 44 Penn., 503; *Bank of Kentucky v. Herndon*, 1 Bush., 359; *Watson v. Gabby*, 18 B. M., 658; *Murrell v. Neil*, 8 How., 426; *Robb v. Mudge*, 14 Gray, 534.

WILBUR F. BROWDER,
Register.

Thos. H. Hines, Esq., for joint creditors.

J. H. Rose, Esq., W. O. Dodd, and Muir, Bijur & Darie,
contra.

I concur in the opinion of the Register.

BLAND BALLARD.

I have re-examined this case with great care, and I have considered the arguments and authorities submitted by counsel, but my opinion remains unchanged.

There is ground for maintaining that the deeds made by the Colliers to Taylor created a trust in favor of the partnership creditors, but there is not, in my opinion, any ground for asserting that they are fraudulent.

I do not understand that either of the parties to the agreement submitted insist that any such trust was created, and, therefore, I shall not pass upon the question suggested.

BLAND BALLARD,
Judge.

In re Hamburger & Frankel.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

If the officers of the court keep possession of the premises the landlord is entitled to a reasonable compensation for the time that they are so occupied.

In re MAX HAMBURGER & BERTHOLD FRANKEL.

THIS cause is pending before me, at the chambers of this court, by an order, dated the 27th day of March, 1875, "to inquire on proofs and report what is a proper amount, if any, to be paid out of the assets of the estate for the use and occupation of the said premises by any officer of the court, or by the assignee, since the petition in bankruptcy was filed." I do hereby certify and report that the petitioners and the assignee have appeared before me: That the facts as appears from the testimony before me taken on this trial, and the proceedings in the matter, are as follows:

The above-named bankrupts, on the 10th day of August, 1874, filed a petition for an adjudication in bankruptcy of themselves, and were duly adjudged bankrupts the same day, and thereupon surrendered to me their estate and effects, consisting in part of pictures, picture-frames, mouldings, machinery, etc., situated on the third and fourth lofts of the premises, Nos. 18 and 20 Vesey street, in the city of New York, which remained in my possession until on or about the 18th day of February, 1875, when an assignee was appointed. That the assignee subsequently sold said property, and on the 15th day of March, 1875, delivered the keys of said premises to the petitioners, the landlords of said premises, from whom the said bankrupts held a lease of said premises at a yearly rental of one thousand eight hundred dollars, which said lease is hereunto annexed. That the said bankrupts sought to effect a compromise with their creditors, under the provisions of Section 5103 A. of the Revised Statutes, which was accepted by their creditors at a meeting held for that purpose on the 2d day of October, 1874, and afterwards duly

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ratified by the required number and value of their creditors, and subsequently approved by this honorable court, but by reason of the failure of the bankrupts to procure the indorsement of their composition paper by the person relied upon and mentioned by them, at the said composition meeting, the terms of said composition were not carried out. That the order for the first meeting on composition is dated the 12th day of September, 1874, and the second report on composition was filed in the office of the clerk of this court on the 26th day of November, 1875. That pending said proceedings, the petitioners applied to the attorneys for the bankrupts a number of times for possession of said premises, by whom they were told the bankrupts would certainly effect a compromise with their creditors, and they would then pay the rent and remove the goods.

That the petitioners also demanded possession of said premises from the undersigned, by whom they were told "that they would have to proceed in the State courts to dispossess him," that is, the Register, and that he, the Register, "did not know but that this court would enjoin the petitioners from putting the goods on the sidewalk." That no formal proceedings were taken by the petitioners to get possession of the said premises until after the failure of the bankrupts to carry out the terms of the said composition, when they applied to this court by petition dated the 11th day of December, 1874, praying "for an order directing me, the said Register, to sell said property stored in said lofts, as aforesaid, according to the rules and practice of this court." That said petition was referred to the undersigned, by an order of this court, dated the 6th day of January, 1875, to take proofs and report to this court what ought to be done in the matter.

That several witnesses were examined under said order, but before the testimony was completed, the bankrupts applied to the undersigned for a warrant for the first meeting of creditors for the purpose of electing an assignee, whereupon the petitioners suspended further proceedings under the

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said order, and the undersigned as Register and the assignee of said bankrupts retained successively undisturbed possession of said premises until the 15th day of March, 1875, when the keys thereof were surrendered to the petitioners by the said assignee.

That the testimony taken under the order of January 6th, 1875, is herewith returned as a part of these proceedings, it having been offered in evidence by the attorney for the assignee.

That no agreement was entered into by the undersigned, or the assignee herein, with the petitioners, as to what rent should be paid for said premises while occupied by them in their respective capacities as Register and assignee.

A witness as an expert testifies that the said premises were and are worth the sum of one thousand six hundred dollars per annum, whether used for manufacturing purposes or merely for storage. That he never had occasion to collect rent from a tenant holding without an agreement.

The facts in the case are in no wise analogous to those in the cases cited by the counsel for the assignee in his brief, which is herewith submitted.

In this case the landlords have from the time of the bankruptcy acted the part of just, honest, and honorable men, in every way, aiding the bankrupts to continue their business, and the creditors to obtain the percentage originally agreed upon.

The refusal by the person named by the bankrupts, to indorse their composition notes, was not their fault; they waited patiently for the bankrupts to fulfill their agreement and to carry out the composition sanctioned by this court. That it could not be done was the bankrupts' misfortune, and not the fault of the landlords. The fault was in the overestimate and exaggerated value put by the bankrupts upon their property and business. My experience has taught me that such is the fault common to all bankrupts. But for such a fault the landlords cannot, neither should they be punished by depriving them of a fair and just compensation

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for the use and occupation of their premises. Bankruptcy, like death, is the end of all things; contracts as well as all other things cease and end by an adjudication. In this case, the lease terminated with the bankruptcy, after which the landlord must apply to the court, as per practice, and must prove the value of the premises so occupied. This they have done, and the amount is not controverted nor disputed by the assignee. The court has had possession of the premises. To have removed the property and rented other premises would have been much more expensive, and entailed a much larger sum upon the estate than the amount claimed by the landlords. The retention of the premises has been for the best interest of the creditors. Equity and good conscience requires that the landlords should be fairly and justly dealt with. It is to be expected that assignees will be cautious and resist all claims they deem doubtful; but the court should see that equal and exact justice was done as between all parties. This is clearly intended by the wording of the order of reference in this case.

The testimony shows the value of the premises to be from one thousand six hundred to one thousand eight hundred dollars per annum, which is a reasonable sum to be paid therefor by the estate. It is apparent that the premises were worth that sum to the estate. The court, by operation of law through its officers, becoming the occupant and deriving title by operation of the Bankrupt Act, succeeds to all the rights and some of the liabilities of the bankrupts, especially those liabilities incurred in the preservation of the estate, as was done in this case. The landlords only claim the actual value of the use of the premises, nothing more.

I do not consider the decision in the case of McGrath & Hunt, 5 N. B. R., 254, as an adverse decision. The application for the order of reference to fix the amount due the landlords was the correct course to be pursued, and the finding of the court fixes the rate at which the landlords as well as the assignee must be bound, as the measure of compensation for the use and occupation of the premises.

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The landlords did not apply to the court for the possession of the property, nor to have a fixed and definite amount of rent agreed upon, but did consent to the occupation of the premises by the estate, and can therefore only be allowed for the use and occupation of the premises what they were worth, be it more or less than the sum named in the lease.

The adjudication in bankruptcy canceled the lease, and if the landlords desired the immediate possession of the premises, or the payment of the rent as named in the lease, they should have applied to the court for the one or the other. Not having done so they can only have the value of the premises allowed them. *In re Metz et al.*, 6 Ben., 571.

The testimony uncontradicted varies from one thousand six hundred to one thousand eight hundred dollars per annum. It has been the uniform practice, and I deem it the correct one, that the claimant pay the fees of the referee upon the making up of the report. In this case let the Register's fees be a charge upon the estate in the hands of the assignee.

I find, and do hereby so report, that the sum of nine hundred and fifty-five dollars and fifty-four cents is due the claimant for the rent of said premises, while the same were occupied by the officers of this court, to wit: from the 10th day of August, 1874, until the 15th day of March, 1875, being seven and one-sixth months at one hundred and thirty-three dollars and thirty-three and one-third cents per month, or one thousand six hundred dollars per annum, and respectfully recommend that an order be entered herein empowering and directing the assignee herein to pay the same out of the funds in his hands belonging to the estate.

BLATCHFORD, J.—Let an order be entered in accordance with the decision of the Register.

Lavender v. Gosnell & Tripolett.

COURT OF APPEALS OF MARYLAND

The adoption of a Bankrupt Law does not divest the State courts of jurisdiction over insolvent proceedings pending at the time of its adoption. When a Bankrupt Law is repealed, the State insolvent laws are again in full force and operation and need not be re-enacted.

Where a debtor who has obtained a discharge under a State insolvent law subsequently obtains a discharge under the Bankrupt Law, the discharge in bankruptcy will not affect the right of the insolvent trustee to property acquired by inheritance after the granting thereof.

LAVENDER v. GOSNELL & TRIPOLETT.

BARTOL, C. J.—Thomas T. O'Dell applied for the benefit of the insolvent laws and received his discharge in January, 1841. On the 28th day of March, 1842, he applied for the benefit of the Bankrupt Law of the United States (of 1841) and received his final discharge thereunder in August, 1842.

In December, 1843, Elizabeth, wife of Isaiah O'Dell, died intestate, seized in fee of a tract of land known as "Sheepfold and Wilmot's Meadows," leaving her husband surviving her, who died in 1847, and six heirs-at-law, among whom was Thomas J. O'Dell, the insolvent, who by deed dated the 10th day of May, 1864, conveyed all his interest in the lands to Elizabeth T. Lavender, the appellant, in trust for his wife and children. On the 7th day of October, 1861, M. J. Gosnell was appointed trustee in the insolvency proceedings, and claiming that he was entitled, as such trustee, to the interest in the land which had devolved upon the insolvent by the death of Elizabeth O'Dell and her husband, by virtue of the Act of 1834, Ch. 293, Section 2, sold and conveyed it to the appellees, who are now in possession. This action was brought by the lessor of the appellant, claiming title under the deed of May 10th, 1864. The plaintiff having abandoned all claim to "Sheepfold" the contest was as to the title to "Wilmot's Meadows." There was no dispute as to the facts above stated, and it was admitted that "the list of debts furnished by the bankrupt did not include any mentioned in the insolvency proceedings." By agreement of counsel filed in this court, it is ad-

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mitted that the assets of the insolvent were not sufficient to pay the creditors mentioned in the insolvent proceedings, and that at the time of O'Dell's petition in bankruptcy, balances of their claims remained unsatisfied.

In this state of facts the only question to be decided is whether the title to the lands devolved upon the insolvent trustee under the Act of 1834, Ch. 293.

The 2d Section of that Act provided "that all property * * * * * that shall be acquired by or accrue to the insolvent debtor by gift, descent, or in his own right by bequest, devise, or in any course of distribution, shall be deemed and so distributed and applied, as estate of said insolvent debtor, for the benefit of his creditors, at the time of his application, and as effectually as any property mentioned in the schedule of such insolvent debtor upon his said application, and shall as and from the time of said acquisition or accrual, vest in any trustee or trustees for his or her creditors, appointed or hereafter to be appointed under such application, * * * * *."

There can be no doubt about the construction and effect of this section. It declares in terms that the property which accrues to the insolvent, after his discharge, by inheritance, shall vest in the trustee, for the benefit of his creditors, who were such at the time of his application. See *State v. Culler*, 18 Md., 419, 433. Upon the death of Mrs. Isaiah O'Dell, in December, 1843, the one-sixth part of the land in question, which descended to Thomas, the insolvent, as one of her heirs, was instantly vested in his insolvent trustee, by force of the Act of 1834, above cited; the statute operating to change the course of descent, and to substitute the trustee in the place of the insolvent, as the party to take the estate, which would otherwise have vested in the insolvent, and consequently, the latter could pass no title to the plaintiff's lessee by his deed of May 10th, 1864.

But it is contended that the discharge of O'Dell under the Bankrupt Law in 1842, has defeated the title of the insolvent trustee. First, because the Bankrupt Law operated

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as a repeal of the insolvent laws of the State ; and Secondly, because, by his discharge under the Bankrupt Law, O'Dell was released from all his debts, and there being no creditors remaining, the powers and rights of the insolvent trustee have ceased, and he cannot claim the property.

The answer to this argument seems to us to be very plain.

It is certainly well settled that the power conferred upon Congress by the Constitution to establish a uniform system of bankruptcy, when it has been exercised, is paramount and exclusive, and suspends the insolvent laws of the State, and the jurisdiction of the State courts over cases falling within the purview and operation of the Bankrupt Law. *Van Nostrand v. Carr*, 2 N. B. R., 485 ; s. c., 30 Md., 128. But that does not affect the rights of the parties in the present suit. The Bankrupt Law did not go into effect till the 1st day of February, 1842. Long before that time (viz., in March, 1840) O'Dell had petitioned under the insolvent laws and executed a deed to his trustee, and in January, 1841, had been finally discharged. During all that time the Act of 1834 was in full operation, and under it the rights of the creditors and of the trustee had been fixed. Under that act, as we have seen, the trustee became entitled to receive, for the benefit of the creditors, any property which might thereafter accrue to the insolvent in the manner prescribed by the act. This right, though dependent for its beneficial enjoyment, was as completely vested in the trustee as was his right to the property mentioned in the insolvent's schedule, and was not divested by the Bankrupt Law which was afterwards passed. The effect of the Bankrupt Act, while it was in operation, was to *suspend, not to repeal* the insolvent laws of the State, and when the former was repealed on the 3d day of March, 1843, the insolvent system was again in full force and operation. The Legislature, however, out of abundant caution, re-enacted the several acts and statutes of the State relating to insolvent debtors, which were in force and operation at the time of the passage of the Bankrupt Law, Act of 1843, Ch. 109. But it is quite immaterial to consider either

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the effect of this act or the necessity for its passage, as it is very evident that the rights of the trustee would not have been impaired or affected by the Bankrupt Law even if it had remained in full operation.

Now, what was the effect of O'Dell's discharge under the Bankrupt Law? The counsel for the appellant have argued that it released the bankrupt from all the debts which he owed at the time of his application under the insolvent laws, and that all such debts have been thereby canceled as effectually as if they had been paid. But this is an error. By his discharge under the insolvent laws O'Dell had been released from all his debts and liabilities existing at the time of his application; consequently, his then creditors had ceased to be such and would not have been entitled to prove their claims against him in the Bankrupt Court, or to participate in the funds in the hands of the assignee.

This is conclusive to show that they were not affected by the discharge in bankruptcy.

When the proceedings in bankruptcy took place O'Dell was not seized or possessed of the land now in controversy, nor had he any right or title therein which could pass to his assignee. He had nothing but a bare expectancy, and all possibility of acquiring it by inheritance had before been surrendered or taken from him by the Act of 1834, which had changed the course of descent, substituting the trustee in his place, and providing that *eo instanti* upon the descent being cast, the property should vest in the trustee for the benefit of his creditors, from whose debts he had been discharged under the insolvent laws.

For these reasons we are of opinion the prayer offered by the appellant was properly refused.

Judgment affirmed.

In re Central Bank of Brooklyn.

UNITED STATES DISTRICT COURT—E. D. NEW YORK.

A judgment of a State court rendered in an action to which the assignee was a party, directing the payment of a certain sum out of the assets of the bankrupt, affords no legal ground to authorize the Bankrupt Court to countersign a check, to enable the plaintiff to obtain such sum.

In re CENTRAL BANK OF BROOKLYN.

BENEDICT, J.—Joseph H. Havens presents to this court his petition, wherein he prays this court to countersign the proper check, to enable Silas B. Dutcher, assignee of the Central Bank of Brooklyn, a bankrupt, to pay him the sum of four thousand two hundred and eighty-two dollars and eighty-five cents.

In support of this petition there has been exhibited to this court the record of an action brought by the petitioner in the Supreme Court of the State of New York, wherein, on the 16th day of January, 1873, it was by said court adjudged that the petitioner recover against Silas B. Dutcher, assignee, as aforesaid, "the sum of three thousand six hundred and fifty-seven dollars, together with the sum of three hundred and forty-nine dollars and eighty-eight cents, interest, and two hundred and seventy-five dollars, costs; amounting, in all, to the sum of four thousand two hundred and eighty-two dollars and eighty-five cents, the said sum to be paid out of the assets of said bank, now in possession of said defendant assignee as aforesaid, or out of any assets that may hereafter come into his possession as such assignee as aforesaid."

The said record also shows that it was made to appear to the said Supreme Court that the National City Bank of Brooklyn held the moneys which had been received by the assignee of the Central Bank, whereupon, as also appears by said records, on the 25th day of September, 1874, the said Supreme Court, in the action aforesaid, ordered "that the said National City Bank pay, within three days after service of a copy of this order, to E. L. Sanderson, the plaintiff's attorney, out of said moneys the sum of four thousand two hundred and eighty-two dollars and eighty-five cents (\$4,282.85), together

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with interest on that sum from the twenty-second day of May, 1874, amounting, in the aggregate, to the sum of four thousand three hundred and eighty-four dollars and fifty-three cents (\$4,384.53), and upon said E. L. Sanderson delivering or tendering to said National City Bank a proper satisfaction of the judgment referred to in these proceedings, and of the interest due thereon, for which payment, so to be made, this order shall be the receipt and voucher of said bank."

The National City Bank referred to in the above order does not appear, by said record, to be a party defendant in the action brought by the petitioner, but that bank is a depository designated by this court under the provisions of the Bankrupt Laws of the United States, and of General Order No. 28, issued by the Supreme Court of the United States, which requires the designation by the District Courts of the United States of a depository, where all moneys received by assignees shall be deposited, and which further provides that no moneys so deposited shall be drawn from such depository, unless upon a check or warrant signed by the clerk of the court, or by an assignee, and countersigned by the judge of the court, or one of the registers designated for that purpose, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check, or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose, by the assignee or the clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate.

This record is the only matter produced in evidence before me, and upon it the petitioner claims that he is entitled to ask this court to direct the payment to him of the amount of the said judgment out of the assets of the Central Bank.

To this claim I cannot accede. The judgment rendered by the Supreme Court of the State, in the action brought by the petitioner, and upon which he makes his right to depend, is in excess of the jurisdiction of a court of a State.

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The power of a State court to determine the personal liability of an assignee in bankruptcy, by reason of his acts, where the assignee appears without objection and submits himself to the jurisdiction of the court, is not the question here, nor is the application by an assignee in bankruptcy for relief from the effects of a judgment against him obtained in an action in a State court, where he properly appeared, and which he properly defended. Here the application is by a third party, who bases an application to be paid out of funds in this court, as a court of bankruptcy, solely upon a judgment of a court of the State, directing that his demand be paid out of such funds.

The proof of such a judgment affords no legal ground for the action of this court.

The prayer of the petition must therefore be denied.

The Collateral Security Bank v. Fowler, Trustee.

COURT OF APPEALS—MARYLAND.

If a conventional trustee, claiming title under an assignment, files a bill to recover assets belonging to the estate, the assignee may intervene by a supplemental bill.

THE COLLATERAL SECURITY BANK v. ROBERT FOWLER, Trustee use of ISAAC S. GEORGE, Assignee in Bankruptcy of ISAAC M. DENSON, etc.

BOWIE, J.—The question presented by the present appeal is, whether an assignee in bankruptcy can intervene by supplemental bill in a cause previously begun by a conventional trustee in the Circuit Court of Baltimore City to recover certain certificates of stock belonging to the debtor, and who was declared a bankrupt pending the suit, or the assignee must file an original bill in the nature of a supplemental bill to effect this object.

The leading facts developed in the record are as follows :

On the 10th of September, 1873, the late Robert Fowler, as assignee of Denson & Quincy, of that city, filed in the Circuit Court of Baltimore his bill of complaint, alleging that his assignors, being partners, as such, and as individuals, conveyed all their assets to the complainant, by a certain deed of trust, for the purposes therein mentioned. That Denson held in his own right two certificates of stock in "The People's Gas Company," viz. : one for fifty shares, numbered 2242, and another for fifty shares, numbered 2246, which (as the complainant charged) had come to the possession of Benjamin F. Ullman, President of "The Collateral Security Bank," purporting to be assigned by Denson, but not in fact so assigned, or authorized by him to be assigned, and were presented by Ullman "To the People's Gas Company" for cancellation and renewal ; and being so canceled two other certificates, of fifty shares each, were delivered by "The People's Gas Company" to the said Ullman, as President as aforesaid, in lieu of the original certificates, and he still holds the same. It was further alleged the original certificates

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were delivered to the bank by Quincy without the authority or signature of Denson, or his assent, or ratification, and without consideration. The bill further charged that the new certificates were void, and ought to be delivered up for cancellation, and others issued to the complainant, or in the name of Isaac M. Denson, as of the original dates. "The Gas Company," "The Collateral Security Bank," and Isaac M. Denson were made defendants, and the prayer for relief was that the certificates issued to Ullman, as President, might be canceled, and others issued to the complainant, or Denson, for the use of the complainant, and for other and further relief. "The People's Gas Company," and "The Collateral Security Bank" filed answers denying the material allegations of the bill. Denson answered, admitting them, and consenting to the decree as prayed.

This case was afterwards, by order of the complainant's solicitors, entered to the use of Isaac S. George, assignee of Denson & Quincy, and the cause being so entitled, on the 9th of May, 1874, there was filed in the court a paper entitled "The supplemental bill of Isaac S. George, assignee in bankruptcy of Isaac M. Denson, and also of Denson & Quincy, to whose use was entered the suit of Robert Fowler, trustee of Denson & Quincy, against the said defendants, now pending in said court."

Annexed to this was an application, in writing, for leave to file the same, and for an order requiring the defendants to answer; whereupon the court passed an order granting the leave, and commanding the defendants to answer by a day certain.

This bill recapitulates the proceedings previously had under the original bill, recites substantially its allegations; the answers of the several defendants are referred to, and made a part of the bill; and by way of supplement it is alleged that since the filing of the original bill, Messrs. Denson & Quincy were duly declared bankrupts, and the complainant appointed assignee of the firm, and of each of its members; and by virtue of an assignment, executed in pur-

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suance of the Bankrupt Act, the property of the firm, as well as that of its several members, as individuals, was transferred to the complainant as assignee in bankruptcy, wherefore it was proper the suit should be prosecuted in the name of the complainant, and accordingly the same had been assigned to his use.

It further alleged that Robert Fowler had since departed this life intestate, and Messrs. John H. and David Fowler were appointed his administrators, and praying process against them and the former defendants, prayed for the same relief as prayed for in the original bill, and such other and further relief.

The Collateral Security Bank appeared by counsel, and demurred generally, concluding with the usual prayer, craving judgment whether they are compelled to answer.

The case being submitted on demurrer the same was overruled; hence this appeal. The appellant assigns no cause of exception to any particular allegation, or averment of the bill, but relies solely on the objection that the cause cannot be continued by the complainant by a supplemental bill, but should have been renewed by an "*original bill in the nature of a supplemental bill*," there being no privity of title between the complainant in the original bill, and the present complainant, the appellee.

The objection, if judged by the difference in the terms, would seem to be more nominal than real, but the rights of the parties in the two modes of proceeding, being essentially different, the question involved is of much practical importance. The distinction (says Daniel) may at first sight appear artificial, but it is attended with considerable difference in its practical results; for in those cases in which a supplemental bill only is filed, if there has been no decree, the suit may proceed after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff; but in the case of an original bill in the na-

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ture of a supplemental bill the whole case is open, "a new defense may be made, the pleadings and depositions cannot be made use of in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage, than as it may be an inducement to the court to make a similar decree."

In the case of a supplemental suit, the benefit of the original decree is given the new plaintiff, and he is entitled to stand in the place of the original plaintiff and have the benefit of the proceedings on the original bill. (3 Danl. Ch., Pa., p. 1666, 1667.)

The same learned author says, "Notwithstanding this essential difference between the modes of proceeding and effect of" a supplemental bill and an original bill in the nature of a supplemental bill, "there does not seem to be any general rule deducible from the authorities determining the cases in which the transmission of interest of the sole plaintiff renders the one or the other form of proceeding applicable." *Ibid.*, 1667.

The rule, which seems, according to the decisions, sometimes almost arbitrary, varies according to different writers. The test as to the application of the rule in case of a sole plaintiff would seem to be whether the change of interest in the subject matter was such, by deed or operation of law, as to render the bill or proceedings only defective, or whether it was so entire as to abate the suit; in the first instance, the supplemental bill only is necessary; in the second an original bill in the nature of a supplemental bill is required. "If any property or right in litigation vested in a plaintiff, is transmitted to another by deed or operation of law, the person to whom it is transmitted, is entitled to supply the defects of the suit if it become defective merely, and to continue it, or at least to have the benefit of it, if abated." * * * * *

"Supplemental bills are necessary, First, In respect of some defect in the original bill, or in some proceedings upon it; or Second, In respect of new evidence discovered, or of some event occurring subsequent to the filing of the bill, which

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gives a new interest in the matter in dispute, to a person who is not a party to the bill."

Though a supplemental bill, properly so called, is a bill brought in respect of new matter arisen since the filing of the original bill, and before the original comes to a hearing, yet such a bill may be filed to add parties where the proceedings are in such a state that the original cannot be amended for that purpose. (2 Maddox Chy., p. 520, in Mar.)

"So, if a plaintiff becomes bankrupt, his assignees may file a supplemental bill, or rather an original bill in the nature of a supplemental bill." (*Williams v. Kinder*, 4 Ves., 387; 1 Atk., 263; Cooper's Reports, 590; Redesdale, Jr., Pl., 51; Cited 2 Maddox Chy., 523, 2 Amer., p. 2d London Ed.) In Story's Equity Pleading, treating of bills not original in suits instituted by persons "*suo jure*," Section 336, it is said "when new events or new matters have occurred since the filing of the bill, a supplemental bill is in many cases necessary, for such facts cannot be introduced by way of amendment, but here we are to understand such new events or new matters do not change the rights or interests of the parties before the court (for then, properly speaking, the bill is not simply a supplemental bill), but they merely refer to and support the rights and interests already in the bill." * * *

"To entitle the plaintiff to file a supplemental bill, and thereby obtain the benefit of the former proceedings, it must be in respect to the same title, in the same person, as stated in the original bill." Section 339.

"In cases where the bill is filed in '*autre droit*,' if the interest of the plaintiff entirely determines by death or otherwise, and some other person becomes entitled to the same property, under the same title, as in cases of new assignees in bankruptcy, upon the death or removal of former assignees, or in case of an executor or administrator upon determination of an administration *durante minori ætate* or *pendente lite*, the suit may be likewise added to or continued by supplemental bill. For in these cases there is no change of interest which can affect the question between the parties, but

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only a change of the person in whose name the suit must be prosecuted."

Mr. Story says this distinction between cases in "*autre droit*," and cases of a plaintiff suing in his own right, was taken by Lord Redesdale, and is not recognized by Cooper, and in his own opinion, there is no difference, but he adopts the test of the former.

We are not so much concerned about the authority for the distinction, as the reason assigned for it, which is not without force, i.e., that there was no change of interest which could affect the questions between the parties, but only a change of person, in cases instituted by plaintiff in "*autre droit*." Whether the bill filed to continue and have the benefit of the former proceedings be called a supplemental bill or an original bill in the nature of a supplemental bill, it is clear there has been a change only, in this case, in the person to prosecute the suit, the interest of the original complainant having ceased by operation of the bankruptcy of the holder of the certificates and the appointment of the *cestui que use* as assignee.

The subject-matter of the suit was not changed, the right to new certificates of stock remained unchanged, and the relief sought is the same, viz., the issuing of new certificates to the person entitled by law to hold them.

If the original bill in this case had been filed by the bankrupt, instead of Fowler, his trustee, there can be little doubt that his assignee in bankruptcy would have been allowed to continue the suit by a supplemental bill, or an original bill in the nature of a supplemental, according to all the authorities.

Vide Story's Eq. Pleads., Section 349, note .6, where it is said, "Whether a suit in equity is abated by the bankruptcy of the plaintiff, as well as defective, has been a matter of doubt. But it seems *now* thought that the weight of authority is that it is defective merely, and that the assignees may be brought forward by a supplemental bill. *Vide* Cooper's Eq. Pls., 76, 77; Mitford's Eq. Pls., by Jeremy, 65, and note (t), 66 and notes, 67; *Lee v. Lee*, 1 Hare, 617, *ante* Section 329."

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If the assignees may be brought forward by supplemental bill, they must have the right to bring the suit forward of their own motion.

The "convenience of justice," for which all these rules are devised, requires they should be mutual.

The case of *Winn and Ross v. Albert and wife*, is very similar in its more prominent features to the present. Messrs. Winn and Ross, as conventional trustees, for the benefit of certain creditors of Jones, filed their bill in equity to set aside a decree, which they alleged had been obtained by Albert and wife against Jones by collusion and fraud. Jones having afterwards applied for the benefit of the insolvent laws, Winn and Ross were appointed his permanent trustees. They then filed their petition to be admitted to file a supplemental bill, and for relief.

The late Chancellor in his opinion says: "The principal objection is that the supplemental bill differs from, and is, in fact, antagonistical to the title relied upon in the original bill; it being contended that the plaintiffs cannot have the benefit of the former proceedings by a supplemental bill, but in respect of the same title." It will be perceived that the objection taken in *Winn and Ross v. Albert and wife* to the supplemental bill is stated in almost the identical terms used in this.

After reviewing the authorities and works on practice (most of which have been cited in this case) he concludes that there was no such inconsistency or conflict between the title proposed to be introduced by the supplemental bill, with that set up in the original, as to induce him to refuse his assent to the prayer of the petition. 2 Md. Ch. Dec., 42. The intimation of the Chancellor that if Winn and Ross had been permanent trustees at the time of filing their original bill, they might have presented their claims in both characters without being liable to the objection of multifariousness, does not, we think, materially affect the force of his decision upon the main question.

If the relation between a conventional trustee and permanent trustee, in insolvency, is such that they might be

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united in the same bill, there is the same analogy between a conventional trustee and assignee in bankruptcy. There can be no conflict of title in a case where the whole interest in the subject-matter of controversy is vested in the same person. The operation of the Bankrupt Law, divesting the interest or estate of the bankrupt, previously conveyed to the conventional trustee, confers the estate upon him by a superior title.

The prior deed is not void, but voidable; and where the estate was conveyed to a voluntary trustee, other than the assignee in bankruptcy, it has been held proper, upon a bill by the latter, to set aside the deed to the former, to require the conventional trustee to convey all his interest to the assignee. *Burkholder et al. v. Stump*, 4 B. R., 597; s. c., 8 Phila., 172.

The question as to the property being between trustees and assignees on the one hand, claiming as legal custodians, and the defendants, claiming adversely, it is only consistent with equity and justice that the continuity of the proceedings should be preserved, otherwise the rights of creditors might be lost.

No possible injury can be done the defendants by allowing the complainant to come in by supplemental bill.

The order of the court below, from which this appeal is taken, overrules the demurrer, directs the demurrants to pay the costs of the demurrer, and that they do answer the supplemental bill within twenty days.

This form of order overruling a demurrer is sanctioned by the English elementary works on Equity Pleading and Practice, and the practice and usage in this State.

Although it may be very proper, it is very unusual to file a special demurrer in equity in this State; a general demurrer is almost uniformly put in, which is an admission of the facts alleged in the pleading demurred to, denying their sufficiency in law to sustain the claim or defense for which they are pleaded.

The penalty imposed by the code for filing a plea or de-

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murrer, which is overruled or withdrawn, is the payment of the sum of ten dollars and the costs of the demurrer or plea, and to be in contempt until the penalty and costs are paid (Article 16, Code P. G. L., Section 102); but the party demurring or pleading does not forfeit the right of filing an answer, to which end all the process in equity seems to tend, that the case may be heard on its merits.

There being no error in the order appealed from, the same is affirmed, and the cause will be remanded for further proceedings, in conformity with the views expressed in this opinion.



UNITED STATES DISTRICT COURT—E.D. NEW YORK.

A subpoena for a witness may be served in another district, if he does not live more than one hundred miles from the place where the Register who issues the subpoena requires the witness to attend.

In re WM. S. WOODWARD.

BENEDICT, J.—A proceeding in bankruptcy having been commenced in this court, the question of discharge being before the court upon specifications filed in opposition to the discharge, it was referred to a Register in bankruptcy of this district to take and report to the court the evidence to be adduced by the respective parties upon the said issue. Such reference being thereupon commenced, a summons, in accordance with Form forty-eight, was issued, requiring one George S. Scott to attend as a witness in said proceedings before such Register, at his office, in the city of Brooklyn. The summons was served upon Scott in the city of New York, where he resides. Scott failed to attend in accordance with the summons, and thereupon application is made to the court to attach the witness for his failure so to attend.

The application is opposed for the purpose of obtaining a determination of the question whether a witness is bound to

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regard a summons served upon him out of the district for which the Register is appointed, requiring attendance before that Register, in a district where the witness does not reside.

The general rule undoubtedly is that process does not run beyond the limits of the judicial district. But to this there is a well-known exception in the case of witnesses. Section 876 of the United States Revised Statutes, expressly provides that subpoenas for witnesses who are required to attend a court of the United States, may run into another district.

The provisions of the Bankruptcy Laws confer upon a Register in proper cases, "all the powers of the District Court for the summoning and examination of witnesses." In the present case the Register before whom this witness was required to attend in the city of Brooklyn, had been duly directed, in pursuance of Section 5001, to take the testimony in the proceedings described in the summons, and, therefore, by virtue of Section 5002, the Register had all the powers of this court for the purpose of summoning and examining witnesses in said proceeding.

The witness Scott was therefore liable to be subpoenaed to attend before the Register in this district, notwithstanding the fact that he resided out of the district, as it is conceded that he did not live more than one hundred miles from the city of Brooklyn. The summons served upon the witness had all the effect that would have followed due service of the ordinary subpoena in a civil case, requiring the attendance of the witness before the court. Unless, therefore, the failure to attend is excused, the right of the parties to an attachment cannot be denied.

Some facts, by way of excuse, are stated in the papers, and they were accompanied by expressions of entire willingness on the part of the witness to attend, if he could be legally required to do so. I shall not, therefore, at this time consider the matter offered in excuse, but shall postpone the examination of the question to give the witness the opportunity of demonstrating the sincerity of these expressions by attending before the Register at such reasonable time as may

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be fixed by the Register for the next hearing in the proceedings referred to.

UNITED STATES DISTRICT COURT—CALIFORNIA.

Section 10 of the Act of June, 1874, changing the period of four to two months, is not retrospective in its operation, and does not affect transactions happening before the time fixed for it to take effect.

Section 11 of the same act, substituting "knowing" for "reasonable cause to believe," if it has any, has no greater retroactive force than the similar provision of the new Section 89, and does not affect transactions happening before December 1, 1873, in cases where bankruptcy proceedings were commenced before that date.

W. B. BRADBURY, Assignee of JULIA LYONS, v. JAMES GALLO WAY.

HILLYER, J.—This is a demurrer to the complaint of the assignee.

The petition for an adjudication of bankruptcy against the bankrupt, Julia Lyons, was filed April 9, 1873, and the fraudulent preference is alleged to have been given January 3, 1873, more than two but less than four months before the filing of the petition.

If the right of the assignee to recover is to be controlled by Section 35 of the Bankrupt Act, as it stood before the passage of the amendments of June, 1874, the demurrer must be overruled; if by Sections 10 and 11 of the amendatory act, sustained.

The question presented, therefore, is whether those sections of the amendatory act are retroactive and affect transactions done and proceedings commenced before the passage of the Act of June, 1874, and before the first day of December, 1873.

The bankrupt, Julia Lyons, was not adjudicated such until July 16, 1874, and the learned judge of this court then held that the case was not affected by Section 12 of the amendatory act, because the petition had been filed before the first day of December, 1873. That section is, by its terms, made applicable to all cases of involuntary bankruptcy commenced since the last-mentioned date. On the other hand,

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Section 10, changing the period of four to two months, is, by its terms, not to take effect until two months after the passage of the act. So far, then, as Section 10 is concerned, there is no room for doubt as to the intention of the Legislature. The language shows clearly that it is to have no retrospective operation, and is not to affect transactions happening before the time fixed for it to take effect.

To give the section any retroactive force is to accuse Congress of the absurdity of saying in terms that it should take effect prospectively, when the intention was that it should take effect retrospectively. And it would be idle to fix a time in the future for a provision to take effect, if, when it did go into effect, it was to operate on transactions occurring not only before, but after its passage, and up to the time fixed for its going into operation. I have no doubt on this point, and hold that Section 10 does not affect transactions past when it took effect, or proceedings commenced before that time. As to such matters, Section 35 is not repealed or amended. (See *Singer v. Sloan*, 11 N. B. R., 433.)

Section 11 of the Act of June, 1874, substituting "knowing" for "reasonable cause to believe," in Section 35, has no time fixed for going into operation, and, according to the general rule, takes effect from the time of its passage. It is urged, however, that this suit, brought since the passage of the Act of June 22, 1874, though based on acts done before that time, and before December 1, 1873, can only be maintained by alleging and proving actual knowledge on the part of preferred creditors that a fraud was intended, and not merely "reasonable cause to believe."

In a case in the Eastern District of Wisconsin, like the one at bar, except that the suit by the assignee was begun before June 22, 1874, it was held that the Amendatory Act did not affect the right of the assignee to sue and recover, upon the grounds and provisions contained in Sections 35 and 39, as they stood before the amendments. (*Hamlin v. Pettibone*, 10 N. B. R., 172.) In *Brooke v. McCracken* (10 N. B. R., 461), the bankruptcy proceedings were begun, and the

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preference given after December 1, 1873, and it was held the amendments to Section 35 were not retroactive. The contrary was held in *Singer v. Sloan*, *supra*, upon a case like *Brooke v. McCracken*. The same conclusion was reached by the District Court of Michigan, in the case of *Van Dyke v. Tinker*, 11 N. B. R., 308, a case which cannot be distinguished from this.

In compulsory proceedings it has always been held by the Bankruptcy Courts that Sections 35 and 39 must be construed together in reference to suits brought by an assignee to recover from a creditor a fraudulent preference. The amended Section 39 provides that the assignee may recover the preferred payment if the creditor had reasonable cause to believe the debtor insolvent and *knew* that a fraud on the act was intended. But this provision of the amended section only applies to cases of involuntary bankruptcy, begun since December 1, 1873.

So that, in the present case, the provisions of Section 39 as amended, in regard to knowledge on the part of the creditor, have no application, and the Bankrupt Act would be inconsistent with itself if Section 35, as amended, should be construed to apply to involuntary cases begun before December 1, 1873, which is this case.

It is plain enough that Congress meant, in the amendments to Section 39, to say that in involuntary cases the assignee might recover the property transferred only when the creditor had the actual knowledge prescribed, when the bankruptcy proceedings were begun after December 1, 1873. In cases arising before that date, it would be directly opposed to the expressed will of the Legislature, it seems to me, to apply the new rule of evidence touching knowledge on the part of the creditors, or to give to the amendments to Section 35, in this particular, any greater retrospective force than the Legislature had given to the similar provision of Section 39.

There is another provision of law, which, hitherto, so far as I have read, none of the courts have noticed. Yet it seems to have a direct bearing upon this question.

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It is Section 4 of an act entitled "An Act prescribing the form of the enacting and restraining clauses of acts and resolutions of Congress, and rules for the construction thereof" (16 Stat., 431), now Section 13 of the Revised Statutes, and reads as follows: "The repeal of any statute shall not have the effect to release or extinguish any *penalty, forfeiture, or liability* incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Now, I do not think it can be doubted that a creditor who had received property from his debtor before June, 1874, and under such circumstances that it would be held an unlawful preference under the old Section 35, had "incurred" a "liability" under the act to refund it to the assignee of the debtor, which could be enforced by a proper action. If so, there being no express provision in the repealing act extinguishing this liability, the conclusion is irresistible that it still exists, and that the repealed statute is still in force for the purpose of sustaining any proper action to enforce the liability.

Whether the amendment requiring proof of actual knowledge where before proof of reasonable cause to believe was sufficient, is important, or merely verbal, is a question upon which very learned judges have differed. In the view I have taken of the other points raised by this demurrer, it is unnecessary to decide that question, for whether material or not it has been held that the amendment does not affect the transactions out of which this suit arises.

Demurrer overruled.

Braley v. Boomer et al.

SUPREME COURT—MASSACHUSETTS.

A bankrupt defendant may file a bond to dissolve an attachment, although it was issued more than four months before the commencement of the proceedings in bankruptcy, and have the case continued to await his discharge.

JOSEPH G. BRALEY v. JOHN L. BOOMER and others.

CONTRACT upon an account annexed. The case was heard in the Superior Court, before Allen, J., without a jury, upon the following agreed facts :

The action was commenced by a writ upon which there was an attachment of merchandise, more than four months before the commencement of proceedings in the United States District Court, by which the defendants were adjudged bankrupts, and the bankruptcy of the defendants was suggested at March term, 1874, of the Superior Court. The amount due the plaintiffs was agreed upon at the following June term, at which term a bond, given under the General Statutes by the defendants, was approved by a Master in Chancery, and filed in the clerk's office, for the purpose of dissolving the attachment in the case, after the assignment of the defendant's property in bankruptcy. If said bond dissolves the attachment, or if the assignee in bankruptcy can dissolve the attachment by bond under the General Statutes, the action is to stand continued to await the decision of the question of the defendants' discharge under the bankruptcy proceedings, otherwise the plaintiff is to have judgment, to be satisfied out of the property attached in the suit only.

The Superior Court ordered judgment to be entered for the plaintiff, to be satisfied out of the property attached in the suit only, and the defendants appealed to this court.

J. C. Blaisdell, for the defendants.

W. H. Pierce, for the plaintiff.

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DEVENS, J.—The Bankrupt Act, United States Statute of 1867, Chap. 176, Section 14, by virtue of which the assignment vests in the assignee all the property, real or personal, of the debtor, even if the same is attached on mesne process as such, and dissolves any such attachment, made within four months next preceding the commencement of the proceedings, permits the attachment to continue where it has been made for that length of time, and the lien created by it will be enforced by any requisite proceedings which do not involve a judgment *in personam* (*Bates v. Tappan*, 3 N. B. R., 647; s. c., 99 Mass., 376); but while, in such case, the lien is permitted to continue, no greater validity is imparted to it than it originally possessed, and it remains subject to be dissolved in the manner provided by the laws of the State where it was made.

The provision of the General Statutes, Chap. 123, Section 104, enables any person, whose goods or estate are attached, to dissolve the attachment at any time before final judgment, by giving bond in the manner prescribed, with condition to pay the plaintiff the amount which he may recover within thirty days after final judgment. This provision is not controlled in any manner by the Bankrupt Act, nor is an exception to be engrafted upon it because the defendant has been adjudged a bankrupt, even if the object of the debtor were to release his property so that it might pass to his assignee; the creditor has all the security which the attachment was intended to afford, as it was always liable to be defeated by the debtor, upon giving a bond such as was filed in the present case; if the debtor obtains his discharge as a bankrupt, and this is pleaded, as no final judgment can be rendered against him, the bond given will indeed be discharged by the determination of the contingency upon which it is made to depend. *Carpenter v. Turrell*, 100 Mass., 450; *Hamilton v. Bryant*, 114 Mass.

But if the debtor fails to obtain his discharge, and final judgment is rendered against him, the bond will become operative if such judgment remains unpaid for thirty days.

Judgment reversed—case to stand continued.

Usher v. Pease et al.

SUPREME COURT.—MASSACHUSETTS.

The Bankrupt Law only authorizes the arrest of the debtor under a provisional warrant to secure his attendance at the hearing and adjudication, and no arrest can be made under the warrant after an adjudication.

A bond given by the debtor to secure his release from an arrest made under a provisional warrant after an adjudication is void.

ROWLAND G. USHER v. *WILLIAM C. PEASE* and
others.

CONTRACT by the United States marshal against the sureties on a bail bond, reciting that a warrant had issued out of the District Court of the United States for the district of Massachusetts, for the arrest of Washington Graves. The condition was that Graves should appear before said court, at such times as shall by said court be required, until the decision of said court upon the petition in bankruptcy filed against said Graves, in said court, and until the further order of the court. The declaration alleged as a breach that Graves did not, when ordered by said court, appear before J. F. Conkey, a Register in Bankruptcy. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts, in substance as follows :

The bail bond was signed by the defendants on December 28, 1872. On September 10, 1875, a petition was filed in the United States District Court, by a creditor of Graves, asking that said Graves be adjudged a bankrupt, for causes set forth therein. Upon the filing of this petition, the court directed the entry of an order requiring the bankrupt to appear and show cause according to the provisions of Section 40 of the United States Statutes of 1867, Chap. 176, and issued a warrant to the United States marshal, commanding him to arrest the alleged bankrupt, and him safely keep, unless he shall give bail, to the satisfaction of the court, for his appearance from time to time, as required by the court, until the decision of the

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court upon the petition, and until the further order of the court.

On September 23, 1872, Graves was adjudged a bankrupt upon the above petition. No arrest or service of the warrant was made until after said adjudication, and after a meeting of creditors had been held and an assignee appointed.

On December 28, 1872, the marshal arrested Graves upon said warrant, and he gave the bail bond with sureties now declared on.

Some weeks after the bond was executed, the assignee procured an order of the court, directing Graves to appear for examination before J. F. Conkey, a Register in Bankruptcy, and this order was served according to the precept thereof; but Graves failed to appear. The sureties were also notified to produce Graves for examination under the order, but failed to do so.

If upon the foregoing facts the plaintiff is entitled to recover, judgment is to be entered for the plaintiff, and damages are to be determined according to principles of law applicable to such cases. Otherwise, judgment for the defendants.

C. Delano, for plaintiff.

G. M. Sterns, for defendants.

GRAY, C. J.—The 40th Section of the Bankrupt Act relates to the preliminary proceedings upon the petition of a creditor to have his debtor adjudged a bankrupt; authorizes the court, on the filing of such a petition, to issue an order of notice to the debtor (to be served on him personally, or by publication, as therein directed) to appear, at the time specified in the order, to show cause why the prayer of the petition should not be granted; and also an injunction to restrain the debtor and any other person, in the meantime, from making any transfer or disposition of the debtor's property; and, if there is probable cause for believing that the debtor is about to leave the district, or to remove, conceal, or fraudulently convey or dispose of his property, to issue a warrant to the marshal of the district, commanding him to arrest the

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alleged bankrupt, and him safely keep, unless he shall give bail, to the satisfaction of the court, for his appearance from time to time, as required by the court, until the decision of the court upon the petition, or the further order of the court. United States Statutes of 1867, Chap. 176, Section 40.

The object of the provision for the arrest of the debtor is to secure his attendance at the hearing and adjudication upon the petition to have him adjudged a bankrupt, and to prevent him from meanwhile absconding or putting his property out of reach. The debtor is to be held in custody, or give bail for his appearance, only, until the decision of the court upon the petition, or the further order of the court. The second alternative clearly relates to a time within, and not beyond, that of the first, and appears to have been inserted in the statute with the object of allowing the debtor to be discharged at the discretion of the court before the adjudication of bankruptcy, not of keeping him in custody or attendance after that adjudication and during the pendency of the proceedings in bankruptcy. When the debtor has attended the court at the time of the order adjudging him a bankrupt, he has fulfilled the whole obligation imposed upon him by the statute. That obligation could not be enlarged or extended by the court by substituting "and" for "or" in its order and warrant, and ordering him to be committed, or give bail for his appearance, "until the decision of the court upon said petition, and until the further order of the court." After the adjudication of bankruptcy, the mode of proceeding to compel him to submit to examination would be the same as in the case of a voluntary bankrupt, by petition under Section 26.

The arrest of the bankrupt after the adjudication of bankruptcy, upon the warrant of arrest issued before adjudication, was therefore unauthorized by law, and the bond given to procure his release from that illegal arrest was void.

Judgment for the defendants.

Fowler, Assignee, v. Dillon et al.

UNITED STATES DISTRICT COURT.—E. D. VIRGINIA.

The United States District Court, as a court of equity, having cognizance of all cases and controversies between a bankrupt and his creditors, has the same power to restrain creditors in judgments at law against a bankrupt that a State court of equity would have over such creditors if the debtor were not a bankrupt.

The power to reduce the amount of judgments at law rendered on Confederate contracts, to the equivalent in legal money, is an equitable power belonging to State courts of equity, and may be exercised in cases where bankrupts are parties defendant, by the United States District Courts.

War interest being inequitable under the laws of Virginia, the United States District Court, as a court of equity, may require the judgment-creditors of a bankrupt to abate such interest when embraced in judgments rendered by default before 1873.

*JNO. S. FOWLER, Assignee, v. JOHN J. DILLON
et al.*

At the June Term of the County Court of Loudon, 1871, judgments by default were obtained, one of them by the administrators of Anne Dillon, deceased, against Wm. N. Hough, for two thousand six hundred and fifty dollars, with interest and costs; another of them against W. N. Hough and two other defendants jointly in favor of Jno. J. Dillon, for one thousand nine hundred dollars, with interest and costs; and another by Jno. J. Dillon against W. N. Hough and two other defendants, for four hundred and fifty dollars, with interest and costs.

At the October Term, 1868, of the Circuit Court of Loudon, a judgment was obtained by the representative of Joshua Reed, deceased, against Wm. N. Hough, for eighty-three dollars and forty-four cents, with interest and costs; and at the June Term, 1871, of the County Court of Loudon, an office judgment was obtained by the representative of Joshua Reed, deceased, against Wm. N. Hough, for the sum of two thousand dollars, with interest and costs, subject to large credits for payments made November 28, 1870, and December 21, 1870. Upon these latter judgments execution went out, and were returned, or levied, so as to bind the personal property of Wm. N. Hough; and the

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judgments were docketed as liens upon his real estate. Except the one specified, no part of these judgments has been paid.

On the 15th day of March, 1873, the said Wm. N. Hough was adjudicated a bankrupt in this court.

All the debts on which the judgments named were taken were Confederate debts, made during the civil war, and the consideration of them Confederate money or bank bills of banks of the Confederacy. The amounts of the debts for which these judgments were taken were never scaled down to their value in genuine money; but the judgments were taken for their full face value. All the judgments, except probably that of October, 1868, were by default, and embraced interest for the period of the civil war. The Act of Assembly relieving against war interest was not passed until April 2, 1873.

HUGHES, J.—The question is, Can this court require the creditors in these judgments to scale these debts? The courts of Virginia, as courts of equity, have frequently interfered when their powers were invoked to rectify the amounts for which judgments at law have been taken expressed in Confederate money. And besides this prescriptive equitable power to correct mistakes in judgments, and prevent the enforcing of unconscionable claims, exercised by these courts as Courts of Chancery, the Legislature has conferred statutory powers upon the courts in this class of cases. Recognizing the equity of thus scaling debts contracted in an inflated and depreciated currency, and in order to secure uniformity of procedure, the General Assembly of Virginia, in Acts of Assembly for 1872–3, p. 219, Code of 1873, p. 982, passed laws allowing proof of the real consideration of Confederate contracts to be made, directing Confederate debts to be scaled by a fixed schedule of values; giving remedies in the courts against judgments for Confederate debts obtained after the war by default, and obtained during the war for Confederate amounts; and giving the courts

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power, upon evidence, to scale the said debts and judgments "as of such date as may to the court seem right "in the particular case."

The courts of the State, as Courts of Chancery, have not considered that in exercising this power to adjust the amounts due upon money contracts according to principles of equity and good conscience, they were violating or impairing contracts; but have thought, rather, that they were executing them according to the real intention of parties. And the General Assembly of Virginia has not, in endeavoring to fix a schedule for the graduation of contracts, thought for a moment that it was abrogating or impairing contracts; but rather that it was providing a legal basis for the private settlement of Confederate contracts, and thus preventing the necessity of carrying every such contract into the courts.

I do not, therefore, concur in the proposition of counsel for the judgment-creditors of Hough, that judgments by default for the full amount of money called for by Confederate contracts are vested rights, beyond the reach of an Act of Assembly or a Court of Equity. The power of the Court of Chancery over judgments at law has not been disputed since the reign of James I., and extends to the proceeding at law in every stage. (Story, Eq. Jur., Section 886; Kerr on Injunctions, pp. 21-7; and Spence's Eq. Jur., p. 674.) In repeated cases in Virginia have the State courts, as Courts of Equity, interfered to rectify the amounts recovered by judgment on Confederate contracts, by scaling them to their equitable value. And the General Assembly of Virginia has, in Chap. 43, Section 10, of the Code, recognized this power in Courts of Equity, and forbidden its abridgment, by providing that nothing in the act making provision for the correction of judgments and adjustment of accounts due upon Confederate contracts "shall be construed to take away or impair the ordinary jurisdiction of Courts of Equity." It has, moreover, given a remedy by summary motion in courts of law to any defendant aggrieved by judgment on default for Confederate money, rendered since March 3, 1866. Certainly, if such judgments

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may be opened by summary motion on notice to the creditor, there can be no successful denial of the power of a Court of Equity, clothed with a prescriptive jurisdiction over contracts and judgments, which has existed for nearly three centuries, to correct judgments of the class under consideration, by enjoining creditors from enforcing them.

If, therefore, this were a court of the State sitting in chancery, upon a general creditors' bill, brought for the marshaling and distribution of the effects of an insolvent debtor, there would be no doubt not only of its power to look into the consideration of the contracts on which the judgments against Hough were obtained, for the purpose of rectifying them, but it would be its duty to do so, and to reduce the amount to their proper value, for the benefit of the creditors of the estate.

The proceeding in bankruptcy is nothing more nor less in its nature and objects than a general creditors' bill; and the Bankruptcy Court is in effect a Court of Chancery, established for the specific purpose of administering a bankrupt's estate under a proceeding which is in effect a general creditors' bill. As such, it has precisely the same powers in equity over judgments of State courts affecting the bankrupt's estate, which a State Court of Equity would have under a general creditors' bill, if the debtor were not a bankrupt. It is true that the Bankrupt Act forbids the summary proceedings in bankruptcy to be used where third persons, other than the bankrupt and his creditors, are to be affected, and requires, in such cases, that the proceedings taken in the District Court shall be plenary proceedings, in the form of a suit in equity. This requirement has been enforced in the present case; and the question is, Has this court power to look into the consideration on which the debts of Hough, the bankrupt, were founded, which are the subject of the judgments that have been described?

As a Court of Equity, clothed with power and jurisdiction over "all cases and controversies between the bankrupt and his creditors, for the collection of assets, and the ascer-

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tainment and liquidation of liens thereon, and for the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties, and to effect a due distribution of the assets among all the creditors," this court has not only the same power as a State Court of Equity to restrain the enforcement of a judgment at law recovered against a bankrupt for an improper amount, but it is its peculiar duty and province to do so. As the State Courts of Equity do not hesitate, when invoked, to restrain the enforcement of judgments for the full amount of Confederate contracts, it cannot be deemed an unusual or unauthorized stretch of power in a Bankruptcy Court sitting in Chancery, to do the same thing.

I have already stated the reasons which induce me to reject the idea that judgments of the class under consideration confer vested rights, and cannot be disturbed except by violating the constitutional inhibition against impairing the obligation of contracts. Congress is not subject to this inhibition, and the courts of the United States may proceed in the discharge of the functions with which they are clothed by Congress, without violating it. But in this case no such objection can hold good. To correct a judgment at law so as to conform the amount recovered by it to the real intention of the parties, and render it consistent with justice and equity, is not to impair the obligation of contracts, but the reverse.

There is but one other question left for consideration; and that is whether, after judgment by default, the judgment-creditor may be made to abate the interest which accrued on his debt during the period of the late civil war. I think the principle is settled in Virginia, that interest during a period of war is not recoverable except by the express allowance of the court or a jury. Judge Joynes, President of the District Court of Appeals at Petersburg, said in the case of *Tucker v. Watson et als.*, 6 A. L. R., 220, upon a review of the authorities on the subject: "After such an array of judicial opinion and authority, including at least one express

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decision of the Court of Appeals of Virginia, we do not feel disposed, if we were at liberty, to examine the question as an original one, and do not think it necessary to explain the various grounds on which the decisions referred to have been placed. . . . We are of opinion that interest during the war is not recoverable."

The laws of Virginia have, from the earliest history of the commonwealth, left the question of interest, in every contract, to the discretion of the jury. The language of the Code of 1849, p. 673, is: "*The jury, in any action on contract, may allow interest on the principal sum due, or any part thereof, and fix the period at which such interest shall commence.*" The language is repeated in the Code of 1873, p. 1120, Section 14; as taken from the Act of Assembly of 1872-3, Chap. 353, passed April 2, 1873. This act gives the same power over interest as to all future contracts. The same act, in another clause, gives power to the *court or jury* to allow or disallow interest arising during the period of the late civil war. The same act, in another clause, provides that on any "judgment or decree *heretofore rendered, which has not been paid*, the defendant may, on motion, after ten days' notice to the plaintiff, cause the same to be reviewed by the court in which it was rendered, and if it shall appear from the record that the judgment embraces [war] interest, it shall be lawful for the court to cause said judgment to be abated to the extent of the interest so embraced." These provisions of statute law, all taken together, conclusively show that in Virginia interest is deemed to be a subject not of natural, but of statutory right, to be allowed to a creditor only when and to the amount prescribed by statute or by the tribunal entrusted with power over the subject. And the last clause above quoted is virtually an assertion by the Legislature, that its power is so complete that judgments for interest shall not confer a vested right, which shall transcend the power of the Legislature or the courts and juries to reach it.

The settled law of Virginia being not only generally that interest is subject to the discretion of a jury; but, specially,

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that interest during the period of war shall not be taken, except by allowance of court or jury after contest, it follows that if a judgment has gone by default for interest during the war at any time before the Act of 1873, it is within the province of a Court of Equity to require the creditor in such a judgment to abate the interest. The judgment does not confer a vested right, and covers an inequitable claim, which it is against the policy of the law of Virginia to allow.

I return, therefore, to the question whether this court, as a Court of Equity, with jurisdiction and power over the creditors in the judgments under consideration, may compel those creditors to abate the war interest on their debts. If they had recovered those judgments after contest, and after the passage of the Act of Assembly of 1872-3, Chap. 353, then the subject may have been *res adjudicata*, and the creditors might not have been interfered with. But, as laid down by Judge Marshall, in 7 Cranch, 336: "Any fact which clearly proves it against conscience to execute a judgment, and of which the enjoined party could not have availed himself at the trial at law . . . will authorize a Court of Equity to interfere by injunction to restrain the adverse party from availing himself of such adverse judgment."

Not doubting, therefore, the power of this court over the creditors in these judgments, and seeing that the laws of the State declare that the collection of war interest is inequitable, and that the law authorizing the disallowance had not been passed at the time that these judgments were rendered, I am of opinion that this court ought to interfere to require an abatement of the war interest on these judgments; and that it ought not to put the bankrupt or the assignee to the needless task of applying to the courts of law which rendered these judgments, for an abatement of this war interest.

In re Sime & Co.

UNITED STATES DISTRICT COURT—CALIFORNIA.

A certificate of deposit proved as a claim in bankruptcy is dishonored paper, and no longer has the qualities of a negotiable instrument.

One who takes an assignment of such a claim, from the apparent owner, as security for an antecedent debt merely, parting with nothing, and incurring no responsibility on the faith of the assignment, is not a *purchaser for value*, and has no equity superior or equal to that of the real owner of the claim.

In re JOHN SIME & CO.

PETITION of Sol. A. Sharpe for an order restraining the Trustee, P. J. White, from paying certain moneys in his hands to one Wm. T. Garratt, and directing the payment of said moneys to the petitioner.

Sharp & Lloyd and Walter H. Tompkins, for petitioner.

M. M. Estee, for respondent.

HILLYER, J.—The material facts are as follows: Sime & Co. were bankers, and on the 1st day of November, 1871, filed a petition, and were adjudged bankrupts. At the time of the failure, Wm. R. Briggs was the holder of two certificates of deposit, issued to him by Sime & Co., of the usual form, payable to himself or his order, on return of the certificate properly indorsed; one for four thousand, and the other for three thousand five hundred dollars. At the same time the petitioner, Sharp, had a balance on an open deposit account to his credit, of one thousand four hundred and thirteen dollars and ninety-two cents.

Prior to the said 1st of November, two suits had been commenced, and were still pending—one against John N. Risdon, and the other against Risdon & Coffee, the plaintiff in each being one Smith, who sued as assignee of John Sime & Co., and for their use and benefit. In these suits the property of John N. Risdon had been attached, and released upon an undertaking executed by William Ware and the respondent Garratt. Garratt had also paid out for Risdon three thousand two hundred dollars on a note. Before executing the undertaking, Garratt obtained

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from Risdon a conveyance of certain real property on Bush street, as security for the money paid, and against his liability on the undertaking.

In this state of affairs an agreement was made between Briggs, Sharp, and Risdon, on the same day (November 1st), whereby it was agreed between them that Sharp and Briggs should assign their claims against Sime & Co. to Risdon; that Risdon should execute notes for sixty per cent. of their amount, the notes to be indorsed by Ware; that the certificates of Briggs and the account of Sharp, when indorsed and assigned, should be placed in the hands of R. H. Lloyd, and the notes in the hands of John R. Jarboe; and that in the event Risdon was able to use these claims as an off-set in the before-mentioned suits, then Lloyd was to deliver the certificates and account to Risdon, and Jarboe the notes to Briggs and Sharp. If the claims were not used as an off-set, then the notes were to be given up by Jarboe to Risdon, and the claims to Briggs and Sharp by Lloyd. At the time of making the agreement it was supposed that Sime & Co. would go into bankruptcy, and it was uncertain whether the claims would be assigned, before the filing of their petition, so that they could be used as off-sets.

In pursuance of this agreement, Sharp made a written assignment of his account to Risdon, and Briggs indorsed his certificates; the notes were executed and placed in the hands of Jarboe, and the claims in the hands of Lloyd. Briggs' indorsement was as follows: "Without recourse, W. R. Briggs."

On the 9th of December, 1871, Lloyd made out formal proofs of these claims in his hands, which were sworn to by Risdon. They were then left in the hands of Register Bates, Mr. Lloyd stating to the Register that he was acting for other parties in the matter, and claimed a right to control the claims. Subsequently the claims got into the hands of the Trustee, White, and on the 12th of September, 1872, into those of Register Clarke. Prior to this no file-mark appears on the claims. Attached to the proof is a copy of Sharp's

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account, with the written assignment and the original certificates of Briggs indorsed in blank as aforesaid. So that on their face the claims appeared to be Risdon's.

On each proof, over the date of October 21, 1872, is a statement, signed by the trustees, to the effect that the claim is allowed, but that they think the assignment was made after the petition was filed, and that the claims cannot be used by Risdon as an off-set.

On November 21, 1872, Risdon, by an assignment, filed with Register Clarke, assigned both claims to the respondent, Wm. T. Garratt, as security, in addition to the real property before conveyed, for the liability on the undertaking, and the money paid as aforesaid.

No new or present consideration was paid by Garratt for the assignment.

When the agreement was made it was supposed the Sime & Co. estate would pay about twenty-five cents on the dollar. Afterwards, by an advance in stocks, the estate became able to pay dollar for dollar.

I find, as a fact from the evidence, that the assignments from Briggs and Sharp to Risdon, were made after the petition was filed.

The suits against Risdon went to judgment without the claims being used as off-sets; ever since the trustee and his attorney have refused their assent to the allowance of them as an off-set in the bankruptcy matter.

Before the filing of the present petition, Briggs assigned his interest in the claims to the petitioner, Sharp.

Upon these facts, it is plain that Risdon never has, and never can, become the true owner of these claims, under the agreement between him, and Sharp, and Briggs. Because he never did, and never can, use them as an off-set to the demand of Sime & Co. against him. The construction sought to be put upon the agreement by counsel for Garratt, that it was the intention of the parties to transfer the absolute title to Risdon, subject only to a right on his part to return the claims and receive the notes if he could not use them as an

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off-set, is not the true one. This is evident from the fact that Sharp and Briggs, by the terms of the agreement, never could become entitled to a delivery of the notes to them until the claims were used as off-sets. The agreement must all be construed together; and, so taken, the use of the claims as an off-set was the thing upon which the right of Risdon to the claims, and of Sharp and Briggs to the notes, hinged.

So far, then, as the parties to the agreement are concerned, the property in these claims never was in Risdon. His assignment of them, under the circumstances, was a fraudulent act; and the only question in this case upon which I have felt any hesitation is, Whether Garratt got these claims under such circumstances as to debar the true owners from asserting their title against him?

But little need be said in answer to that portion of respondent's argument which went upon the assumption that the two certificates of deposit were negotiable instruments, and came into Garratt's hands as indorsee, without notice of any of the facts impeaching Risdon's title.

For, after the bankruptcy of the maker, they were dishonored paper; and, after they were proved and filed as claims in the Bankruptcy Court, they no longer had the qualities of negotiable paper. The claims, as such, were neither transferable by delivery or indorsement; they could still be assigned, but not delivered or taken from the files. It is surely a complete misnomer to call such claims negotiable paper. The claim, then, which embraces the certificates, stands on the same footing as the one proved for the open account.

These claims must be treated as personal property, and as not entitled to the immunities and protection allowed by law to negotiable instruments.

The general rule of the common law is that no one can give a better title to personal property than he has himself. (*Murray v. Lardner*, 2 Wall., 110.)

It is said, in *Root v. French*, 13 Wend., 570, that one ex-

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ception to this rule, which will give a third person a better title and a superior equity to the true owner, is made in favor of a third person, who has given *value* for the property, or incurred some responsibility upon the credit of it, and *without notice* of the fraud.

Garratt claims that he is a purchaser for value without notice of the fraud. Is he? It has been held that "a person who takes a bill which upon the face of it was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder without notice. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it; and is in no better condition than the person from whom he received it." (*Andrews v. Pond*, 13 Pet., 65.) And again, "A note overdue, or a bill dishonored, is a circumstance of suspicion to put those dealing for it afterwards on their guard; and in whose hands it is open to the same defenses it was in the hands of the holder when it fell due. After maturity, such paper cannot be negotiable in the due course of trade, although still assignable." (*Fowler v. Brantley*, 14 Pet., 318.) If this is true of notes and bills which pass by delivery *a fortiori*, it must be so of claims, like those in the present case, assigned after the bankruptcy of the maker, and actually proved up and filed in the bankruptcy proceedings. Nor can the fact that the claims were proved up in the name of Risdon be regarded as any higher evidence of title in him than would his possession of the assigned account and the indorsed certificates, had the claims not been proved and filed.

If it is *prima facie* evidence of title, it is not conclusive against the true owner. Possession, says the Supreme Court of California, of personal property, is only *prima facie* evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments, and whatever comes under the general denomination of currency. The principle that no one can be divested of his property without his consent, and the maxim that no one can transfer a better title than he has himself, control all questions aris-

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ing as to property, of which a transfer is attempted, with the exception stated. (*Wright v. Solomon*, 19 Cal., 64.)

Wetmore v. San Francisco, 44 Cal., 294, cited by respondents, is not against this, because there the assignor of the demand against the city was the true owner of it, and assigned it absolutely. Here Risdon was not the owner, and, under the general rule, could convey no better title than he had.

But is Garratt a purchaser for value? Whether, in the case of the transfer of a negotiable instrument as security for a pre-existing debt, the transferee is a holder for value so as to cut off equities between the antecedent parties, is a very unsettled question. The tendency of the Supreme Court of the United States seems to be towards holding that the transferee, under such circumstances, takes the paper clear of equities of which he had no notice. (*Swift v. Tyson*, 16 Pet., 1; and *Goodman v. Simonds*, 20 How., 343.) But this, if ever it is done, will be on account of the favor with which the commercial law regards negotiable paper, from a desire to make its circulation as safe and untrammelled as possible. The same reason, however, does not apply to this case, and unless the respondent gave *value*, incurred some responsibility, parted with something, on the credit of the assignment, he can have no equity superior or equal to that of the true owners.

But Garratt has parted with nothing on the faith or credit of Risdon's assignment, and will be in no respect worse off, if these claims are returned to the true owner, than he was before they were assigned to him.

The assignment of the claims to Garratt, as a security for pre-existing debts and liabilities, does not constitute him a "purchaser for value," according to the legal import of that term, nor enable him to invoke the rule, that where one of two innocent parties must suffer from the fraud of a third person, he shall suffer who by some act of his has put it in the power of the third person to commit the fraud.

On the other hand, these claims represent so much coin

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deposited by Sharp and Briggs with Sime & Co., and hitherto they have received nothing for them. The notes in Jarboe's hands are not, and, as we have seen, cannot, under the agreement, become available to them. So that, if the respondent were to succeed, he would get some ten thousand dollars, for which he had actually given nothing. Or Risdon himself would get it, in case this additional security was not needed to make Garratt whole on the liabilities he has incurred for Risdon. Such a result is repugnant alike to law and equity.

In addition to this, the testimony of Garratt leaves little doubt in my mind that he took the assignment with full knowledge of the true state of Risdon's title. I rest the decision, however, upon the ground that Garratt is not a purchaser for value, and cannot, therefore, hold these claims against the true owner, whom I find to be the petitioner.

There must be a decree for the petitioner, as prayed, with costs.

UNITED STATES DISTRICT COURT—INDIANA.

The amendatory act of June 22d, 1874, does not apply to preferences and conveyances which are attacked in the course of proceedings in bankruptcy begun prior to December 1, A. D. 1873, and within two years after the commencement thereof.

The provision in Section 11 of the amendment, which enacts that nothing contained in Section 35 of the original act shall be construed to invalidate any security taken in good faith at the time of making a loan, is only declaratory of what the law was before the passage of the amendment. Before the original act was amended, a mortgage given to secure a loan made at the time, in good faith, was valid, even though the mortgagor was insolvent at the time of executing the same, and the party making the loan had knowledge of the fact.

In re MILTON MONTGOMERY.

In 1871, Henry Monyhan loaned the bankrupt three hundred dollars, and took his note therefor. This debt was unpaid in March, 1873, when Monyhan loaned the bankrupt two hun-

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dred dollars more, for which the bankrupt executed another note, and promised to secure the whole debt by the execution of a mortgage on his real estate. He did not return with the mortgage at the appointed time, and Monyhan brought suit against him. Pending this suit, the bankrupt brought a mortgage to Monyhan at Lancaster, on April 10, 1873, which was considered defective. Monyhan and the bankrupt then went together to Salem, where, at the office of Prow, who was Monyhan's attorney, on April 11, 1873, the bankrupt executed and delivered his note to Monyhan for one thousand dollars, and a mortgage, to secure the payment of this note, and another for five hundred dollars, which was executed at the same time, but was not delivered. This note for one thousand dollars was in lieu of the two notes for three hundred dollars, and two hundred dollars, which were then surrendered to the bankrupt. The difference between the aggregate amount of these notes and accrued interest, and one thousand dollars, was at this time loaned the bankrupt by Monyhan. The remainder of the fifteen hundred dollars was never loaned the bankrupt. The bankrupt was insolvent at the time, and had been so for some time previous. His property was encumbered by liens, suits were pending against him in the courts, he was not paying his debts, and in the community where he lived he was generally reputed to be in failing circumstances and insolvent. On July 24, 1873, a petition in bankruptcy was filed against him, and adjudication of bankruptcy was subsequently had thereon. On October 3, 1873, Monyhan proved his debt against the estate of the bankrupt, claiming the mortgage aforesaid as security therefor. Exceptions thereto were filed August 18, 1874, by James Reynolds and George H. Smith, who are creditors of said bankrupt, and whose debts have been duly proven against his estate in bankruptcy, and a re-examination of the claim of Monyhan was had, in the course of which the foregoing facts were elicited.

John H. Butler, Esq., for creditors Reynolds and Smith.

Francis Wilson, Esq., for Henry Monyhan.

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OPINION OF THE REGISTER.

MR. REGISTER BUTLER.—The Bankrupt Law provides that the transfer of property by an insolvent debtor, within a specified period of time before the filing of a petition in bankruptcy by or against him, and under other circumstances which are also specified in the law, is fraudulent and void. The transfer becomes absolutely void upon the filing of the petition in bankruptcy, and may be subsequently set aside as such at the instance of the assignee. The only limitation imposed by the law upon suits for this purpose, is that contained in Section 2, which provides that they shall be brought within two years after the cause of action accrues. The cause of action accrues with the filing of the petition in bankruptcy. Sections 14 and 38. These provisions, which govern suits by assignees to set aside fraudulent conveyances, are substantially applicable to proceedings by an assignee or a creditor who has proved his debt under Section 22 of the law, and Rule 34 of the Supreme Court (United States), to have the court reject claims which are alleged to be “founded in fraud, illegality, or mistake,” when the alleged fraud or illegality consists in the assertion of a security for a debt which has been obtained in violation of them.

If, then, the mortgage executed by the bankrupt in this case to Monyhan, on the 12th of April, A. D. 1873, and claimed by the latter in his proof of debt against the estate of the bankrupt as security therefor, was void under the law as it existed on the 24th of July, A. D., 1873, when the petition in bankruptcy was filed, these creditors, Reynolds and Smith, acquired then a right to have it set aside as such, which they are at liberty to assert at any time within two years afterwards, unless they are divested of it by the amendatory act of June 22, A. D. 1874.

Section 10 of the amendatory act substitutes the period of two months where it was four months, and the period of three months where it was six months, in Section 35 of the original act, as the time within which a conveyance, violated in other

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respects, may be rendered absolutely void by the filing of a petition in bankruptcy by or against the person who has made the same; and suspends the operation of the act in the one case for two months and in the other case for three months after its passage. It was evidently the intention of Congress, as revealed by the context of the amendment and its relation to the amended law, that these provisions should apply only to conveyances which should be attacked in the course of proceedings in bankruptcy, begun after the expiration of these periods of time. They obviously do not refer to proceedings in bankruptcy begun previous to their expiration.

Section 11 of the amendment supplies the word "knowing," where "reasonable cause to believe" was understood in Section 35 of the original act, and prohibits such a construction of this section as would invalidate a *bona fide* security for a contemporaneous loan, besides making some additional verbal changes, which it is unimportant to consider here.

It is a well settled principle of law, that a statute is to be so construed as to give it a prospective operation only, unless the intention of the Legislature to make it retroactive is clearly and unambiguously expressed, or necessarily implied (2 Wall., 347; 24 How., 244; 3 Cranch, 413). There is nothing in the terms of these sections of the amendment, which indicates an intention on the part of its framers, to have them apply to cases begun before its passage, or from which such an intention is necessarily inferred, and in the absence of any positive expression or necessary implication to this effect, they must be considered as prospective only.

The language employed in other sections of the amendatory act, and especially in Section 17, by which the provisions of that section are made *expressly* applicable to "cases of bankruptcy now pending, or to be hereafter pending," etc., seems to denote that the general provisions of the act were not intended to apply to cases pending at the time of its passage.

Confirmatory of this view is the clause in Section 12, by

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which its provisions are made retroactive as to cases of involuntary bankruptcy begun since December 1, 1873. Here the intention of the Legislature is clearly expressed, and it is reasonable to presume that had a like intention existed with reference to other sections, it would have been expressed with legal clearness.

This section, as well as Section 11, makes actual knowledge by the person to whom a conveyance is made, of an intended fraud on the Bankrupt Law, one of the essentials of a fraudulent conveyance, and extends the application of its provisions to all involuntary cases begun since December 1, 1873. It thus excludes any construction which would bring within its purview involuntary cases commenced before that time. Such was the opinion of Hopkins, J., in *Hamlin v. Pettibone*, 10 N. B. R., 172. This being an involuntary case, which was begun prior to December 1, 1873, Section 12 is consequently inapplicable to it.

The principles of construction which have been here applied to the interpretation of Sections 10, 11, and 12 of the amendment, have been fully approved in the consideration of other sections thereof. Section 9, which modifies the conditions of discharge, as they existed in the original act, was held *In re Perkins* (10 N. B. R. 529), to apply only to cases begun after its passage. Such, also, was the opinion of Blatchford, J., *In re Frank* (10 N. B. R., 438). Moreover, the construction which was given Section 9, *In re Perkins*, *supra*, has been already adopted by this court, and, for this reason, the question under present discussion may be regarded as virtually settled in this district; for the application to other sections of the amendment, of the principles on which that decision was based, must result in giving them the construction which is claimed for them.

The case of *Singer, Assignee of Towle, v. Sloan*, (11 N. B. R., 433) which is cited by counsel for Monahan, is not in point, as the petition in bankruptcy against Towle was filed since December 1, 1873. The court especially says that "it is not necessary, for the purposes of this demurrer, to decide

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whether cases brought, or acts done prior to said December, are to be controlled by the amendment. To avoid all doubt as to the views of the court, it is now held that said Section 11 of the Act of 1874 controls all cases brought since December 1, 1873." This case was decided by the District Court, for the Eastern District of Missouri. The Circuit Court for that district had already decided (*In re King*, 10 N. B. R., 566) that Section 9 of the amendment applies to pending cases, and the District Court in the case cited, says, "the same reasoning which produced those rulings (*i. e.*, *In re King, supra*), would *exact* the construction now given." The converse of this proposition is equally true, and where, as in this district, the court has held that Section 9 does *not* apply to pending cases, it may be said that the precedent "exact" a like construction of the sections affecting fraudulent conveyances.

If these sections are held to apply to cases of the kind under consideration, vested rights are thereby destroyed, and contracts are made good which were absolutely void before their enactment. Proceedings in involuntary bankruptcy are very frequently instituted for the purpose of recovering property fraudulently conveyed, and compelling an equal division of it among all creditors. One of the acts of bankruptcy charged in the petition against the bankrupt in this case, is the mortgage to Monahan, which is in controversy. In *Steamship Co. v. Joliffe*, 2 Wall., 450, Mr. Justice Field speaking for the court, it was held that when a right arises under, or is given by a statute, and "it has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of the statute."

This case being therefore governed by the law in existence when the petition in bankruptcy was filed, it remains to be ascertained whether, upon the facts adduced in evidence, the mortgage claimed by Monahan as security for his debt, is in violation of it. It was executed within the four months pre-

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ceding the filing of the petition in bankruptcy. It is conceded that the bankrupt was insolvent when it was executed. The legal effect of the mortgage was to give Monyhan a preference over other creditors as to part of his debt, and to prevent the distribution of the mortgaged property under the Bankrupt Law and defeat the operation thereof, and the bankrupt must, therefore, be presumed to have intended these results of his acts.

The only other point to be determined is whether or not Monyhan had reasonable cause to believe the bankrupt was insolvent, and that the mortgage was in fraud of the Bankrupt Law. The evidence shows that such a state of "facts and circumstances were known to Monyhan as clearly ought to have put him, as a prudent man, upon inquiry." (*Buchanan v. Smith*, 16 Wall, 277; 7 N. B. R., 513. He might have ascertained the insolvency of the bankrupt by reasonable inquiry, and he must, therefore, be held to have had reasonable cause to believe that the bankrupt was insolvent. *Ibid.* These were matters of common notoriety and of public record, and there were proceedings in the courts which Monyhan personally, or by his attorney (with whose knowledge he is chargeable), must be presumed to have known, which were in fact sufficient of themselves to afford reasonable cause for this belief.

The mortgage itself, under all the circumstances of its execution, was out of "the usual and ordinary course of business of the debtor," and, as such, was "*prima facie* evidence of fraud." Section 35. Commenting on this provision of the law, Hall, J., said, in *Graham, Assignee, v. Stark et al.* (3 N. B. R., 357), "this *prima facie* evidence is present to any creditor who accepts a security in any case to which the provision is applicable; and unless the creditor has evidence sufficient to repeal this legal presumption, he has reasonable cause to believe that the security is fraudulent and void under the Bankrupt Act."

For the foregoing reasons, it is the opinion of the Register that the mortgage in controversy is fraudulent and void under the provisions of the Bankrupt Law applicable thereto, and

In re Montgomery.

that the exceptions to the proof of debt of Monyhan ought to be sustained.

OPINION OF THE COURT.

GRESHAM, J.—In 1871 Monyhan loaned the bankrupt three hundred dollars. About the 1st of March, 1873, Monyhan let the bankrupt have two hundred dollars more, and took his note, the latter at the same time agreeing to give a mortgage on his real estate to secure the payment of this note and other loans to be made in the future. The bankrupt failing to return with a mortgage as soon after the loan of the two hundred dollars as he had agreed to, Monyhan placed the two notes, given for the two loans, in the hands of Prow, an attorney at Salem, and suit was brought on them. On the 10th of April, suit having already been brought on the two notes, the bankrupt returned to Monyhan with a mortgage, which the latter refused to take, because he believed the same was defective in form. On the next day, April 11, Monyhan and the bankrupt went to Prow's office, where the mortgage in controversy was executed and delivered, the notes for the two hundred and three hundred dollar loans destroyed, and Monyhan loaned the bankrupt an additional sum, viz. : the difference between the two notes destroyed and interest, and one thousand dollars. For the purposes of this opinion, no further statement of the facts is necessary.

The agreement to give a mortgage at the time the two hundred dollars was loaned was binding, and Monyhan might have enforced the same against the bankrupt. In equity the case stands as if the mortgage had been executed at the time of the loan.

That part of Section 11 of the Supplemental Act of June 22, 1874, which provides that nothing contained in Section 35 of the original act shall be construed to invalidate any security taken in good faith at the time of making a loan, was only declaratory of what the law was before the passage of the amendment. Before the original act was amended, a

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mortgage given to secure a loan made at the time in good faith, was valid, even though the mortgagor was insolvent at the time of executing the same, and the party making the loan had knowledge of the fact.

It is clear that at the time the mortgage was executed and delivered at Prow's office, and the last money was advanced, and at the time the two hundred dollars was loaned, the bankrupt was insolvent, and from all the evidence, I am unable to escape the conclusion that Monyhan had knowledge of this fact, but I do not think Monyhan is shown to have acted in bad faith within the meaning of the statute, in taking the mortgage, so far as it covered the money advanced at the time of its execution, and the two hundred dollars loaned with a promise of security as stated.

The exceptions are overruled and disallowed as to all of the claim, except the three hundred dollars loaned in 1871. In all other respects the opinion and finding of the register are approved.



UNITED STATES CIRCUIT COURT—S. D. MISSISSIPPI.

Although the claim of a landlord is not strictly a lien, yet under the laws of Mississippi it is entitled to priority of payment out of the estate.

AUSTIN v. O'REILLY, Assignee, etc.

THIS was a contest between the landlord of the bankrupts, claiming priority, and the assignee. At the time of the adjudication the bankrupts were indebted to Austin, the landlord, in the sum of one thousand eight hundred and fifty dollars, for a year's rent of the premises occupied by them in conducting their business, and had in their possession (on the demised premises) sufficient property liable to distress for rent, to satisfy the amount. An assignee being appointed, this rent was demanded of him before he removed the property, and payment refused, upon the view that the claim for

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rent stood upon the same footing as an ordinary debt against the estate. Section 852 of the Code of Mississippi is a substantial transcript of the statute of 8 Anne, on the same subject (which is in force, by express enactment, or otherwise, in most of the States), and is as follows :

“ No goods or chattels, lying or being upon any messuage, lands, or tenements leased for life, years, at will, or otherwise, shall at any time be liable to be taken by virtue of any writ of *fiери facias*, or other process whatever, unless the party so taking the same, shall, before the removal of the goods from such premises, pay or tender to the landlord or lessor thereof all money due for the rent of said premises, at the time of taking such goods and chattels in execution, whether the day of payment, by the terms of the lease, shall have come or not ; *provided* the money due shall not amount to more than one year's rent, and if more be due, then the party suing out such execution, paying or tendering to such landlord or lessor one year's rent, may proceed to execute his judgment, and the officer levying the same is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent, as the execution money.” The Supreme Court of Mississippi, considering the landlord's rights, both at common law and under this statute, has held in two recent cases (*Marye v. Dyche*, 42 Miss., 347, and *Stamps v. Gillman*, 43 Miss., 456), that there is no lien, *per se*, for rent given by either ; that what is popularly so-called is nothing more than a right, in certain events, to sue out a distress or attachment, an actual seizure under which creates a specific lien ; and that previous to such seizure, the tenant may sell or incumber his effects so as to defeat the landlord's right, as, for instance, by mortgage or deed in trust, *bona fide* executed—the contest in those cases being between the landlord and mortgage creditors of the tenant. In this state of fact and law, Austin, the landlord, filed his petition in the District Court, praying that the assignee might be adjudged to pay his rent out of the proceeds of the goods taken from the demised premises as a preferred claim, there being, as to those goods, no cred-

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itors by mortgage or deed in trust. A demurrer to the petition, by the assignee, having been sustained by the District Court, Hill J., presiding, the matter was heard in this court on petition for review.

Buck & Clark, for the landlord, cited: *In re Appold*, 1 N. B. R., 621; *Walker v. Barton*, 3 N. B. R., 265; *In re Wynne*, 4 N. B. R., 23; *In re Trim et al.*, 5 N. B. R., 23; *Longstreth v. Pennock*, 12 N. B. R., 95; s.c., 20 Wall., 575, *pro*; and commented on *Brock v. Terrell*, 2 N. B. R., 643; *In re Joslyn et al.*, 3 N. B. R., 473; *In re Butler*, 6 N. B. R., 501; and *Marye v. Dyche*, 42 Miss., 347, and *Stamps v. Gillman*, 43 *Ib.*, 456, *contra*.

Pittman & Catchings, for the assignee, relied on *Marye v. Dyche*, and *Stamps v. Gillman*, *supra*.

BRADLEY, J.—This case depends on the question whether, in the State of Mississippi, a landlord, whose tenant becomes a bankrupt before any attachment has been issued for rent, is entitled to priority of payment over the general creditors. This question must be decided in view of the provisions of the Bankrupt Law, and the peculiar rights of landlords, in reference to enforcing payment of rent in Mississippi. The Bankrupt Act (Section 14) declares that the assignment shall relate back to the commencement of proceedings in bankruptcy, and that, by operation of law, the title to all property and estate, both real and personal, of the bankrupt, shall vest in the assignee, although attached on *mesne* process, and shall dissolve any such attachment made within four months next preceding. The inchoate lien obtained by an attachment, and not perfected by judgment, is thus rendered null by the proceedings in bankruptcy. But perfected liens are protected.

It is provided by the same section that the assignee, under authority of the court, may redeem or discharge any mortgage, pledge, deposit, or lien, and tender performance of the condition thereof, or sell the property subject thereto; and Section 20 of the Bankrupt Act provides that when a

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creditor has a mortgage, pledge, or lien for securing his debt, he shall be admitted as a creditor against the general estate, only for the balance due him after deducting the value of the property on which he has such security, unless he consent to release it.

These provisions show that all liens, except such inchoate ones as arise upon an attachment, are protected by the law.

But how do these provisions operate upon the peculiar lien, or right of distress, given to a landlord for his rent? That right, at common law, was founded on the principle that the landlord retained his ownership, not only in the land, but in so much of the produce thereof as was reserved by him for its use. Such reserved portion, or *reditus*, was considered as belonging to him by virtue of his original ownership; but not being separated from the rest of the profits, he could only seize a reasonable amount as a distress or security to compel the payment or appropriation of his stipulated portion. When the render consisted of personal service, such service was regarded as in lieu of the profits of the land, to which, until the service was rendered, the landlord's qualified property and right of distress extended as in the case of actual rents. The Legislature afterwards extended the right of distress to other things besides the profits of the land; and as far as the right extended, the principle of the latent or qualified property of the landlord in the subject of distress accompanied it. Other legislation enabled him to sell the goods distrained in order to realize the amount of his rent, if the tenant proved refractory. In some States it is provided that, instead of making the distress himself, the landlord must procure a warrant from a magistrate or court, to be executed by an officer. But this regulation of the mode of exercising his right does not affect the nature of the right itself.

It is common to call the right a lien, and yet it is not strictly such, for it does not attach to any specific article of property. The tenant, if a farmer, may, in due course of business, sell produce or cattle or other things, and if a mer-

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chant, he may in the same manner sell merchandise, and the sales if made in good faith will be valid, and the property sold will be free from the landlord's right of distress if removed from the demised premises, and, in most States, without such removal. But if the sale be made for the purpose of depriving the landlord of his right, he may, by the English statutes, and by the statutes of most States, follow the property within a reasonable time after its removal.

Now, if the landlord's rights were a strict lien, no valid sales could be made at all. Still, being commonly called a lien, and being a peculiar right in the nature of a lien, which is greatly relied on as an essential condition of all leases, and the subversion of which would work great injustice, and would in the end operate prejudicially to the interests both of the tenants and their creditors, by inducing landlords to require onerous conditions, for their security, the Supreme Court of the United States, and most of the District and Circuit Courts, have regarded it as fairly to be classed as a lien within the true intent and meaning of the Bankrupt Act, and have allowed the landlord a priority over the general creditors to the extent of the goods subject to his right of distress.

This right of the landlord has been regarded as peculiarly entitled to priority, when by statute an execution-creditor of the tenant is prohibited from removing the goods until he has paid the landlord's rent, or a reasonable amount (generally a year's rent), which may have accrued. Thus in *Longstreth v. Pennock*, 12 N. B. R., 95, s. c., 20 Wall., 575, the Supreme Court places special emphasis on this fact.

In Mississippi, it is true, the landlord is obliged to sue out an attachment for the purpose of effecting a distress for rent, but when the attachment is sued out, his rights are the same in effect as those of the landlord at common law. That they are founded on and grow out of those rights, is evident from the fact that he is not compelled to pursue his claim to judgment like other creditors. The attachment in his case is in the nature of an execution, or, more properly speaking, of a

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distress. He has the same right of priority over execution creditors, and the same right to prevent the removal of goods, and to follow goods clandestinely removed, which exists in England and most of the other States. It is true that the Supreme Court of this State has held that the landlord's right is not a lien; and that a *bona fide* mortgage or sale by the tenant will displace it.

I do not think, however, that these decisions are sufficient to deprive the landlord in bankruptcy proceedings of his just right of priority over the general creditors. They gave credit with the understanding that the landlord's right was superior to theirs. He, therefore, has an equity to be preferred. With regard to them he stands in precisely the same position, and invested with the same rights, as if his common law right of distress remained.

The decree of the District Court is reversed, and a decree will be made declaring the right of the landlord to be preferred before the general creditors, upon the proceeds of all goods subject to his right of attachment at the time the proceedings in bankruptcy commenced.

Decree reversed.

SUPREME COURT—PENNSYLVANIA.

A State court may entertain an action brought by an assignee to recover money received as a preference. The consent of the debtor to revive a judgment so as to continue the lien thereof does not affect the creditor with knowledge of insolvency which he had no reasonable cause to believe from any other facts.

KEMMERER v. TOOL.

ERROR to the Court of Common Pleas of Lehigh county.

SHARSWOOD, J.—The errors assigned, except the third, to the charge of the court, may be dismissed with the general remark that they are not sustained. We have no doubt of the jurisdiction of a State court to entertain such an action.

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and although in an ordinary case it may be doubted whether a *bona fide* creditor who has received from a sheriff the amount of his claim and may in good conscience retain it, though the payment to him was by mistake, can be compelled by an action to refund; yet in this particular class of cases that question is precluded by the express provision of the 35th Section of the Bankrupt Act, that "the assignee may recover the property or the value of it, from the person so receiving it or so to be benefited," in contravention of the enactment as to fraudulent preferences.

We think, however, that there was error in so much of the charge excepted to as instructed the jury that when a subsisting debt is secured by judgment, and "a revival is taken merely to extend the lien thereof, it is an act done out of the usual course of business, and being so done it was the duty of the defendant to make an inquiry as to the solvency or insolvency of Knerr, and on failure to make the inquiry, the presumption follows that the defendant would have found reasonable cause to induce the belief that Knerr was insolvent or was contemplating insolvency. There being no evidence that such inquiry was made, you are instructed that this requisite has been established;" namely, that the defendant, Kemmerer, had reasonable cause to believe that Knerr was insolvent.

That the learned judge was supported by some of the bankrupt decisions in the Federal courts prior to the determination of the Supreme Court of the United States in *Wilson v. City Bank*, 9 N. B. R., 97; s. c., 17 Wall., 473, must be conceded. But the Supreme Court in that case gave a more liberal and reasonable construction of the Bankrupt Act in support of the rights of *bona fide* creditors. It was held, that something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due, and he is without just defense to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the Bankrupt Act; that, though the

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judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the Bankrupt Law; and that a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

We must assume in this argument that Kemmerer had no knowledge of Knerr's insolvency, and no reasonable cause to believe it, unless in the bare fact that Knerr on his, Kemmerer's, application, was willing to consent to a revival of his judgment, so that it might be a lien on real estate acquired by Knerr subsequent to its date. What was there in this to excite Kemmerer's suspicion, or put him on inquiry? Is it out of the usual course of business for a judgment creditor, the lien of whose judgment is about to expire, to say to his debtor, "I do not wish to put you to any unnecessary costs by adverse process; give me an amicable revival." It may be said to be almost an every-day thing. The advantage is all on the side of the debtor, not of the creditor. Kemmerer might at once have sued out an execution, made a levy on the after acquired real estate, and then secured the lien which he was desirous of obtaining. Surely, the mere circumstance that the debtor consented to do a thing which in any aspect was for his own benefit should not be allowed to affect the creditor with knowledge of insolvency, which from no other facts he had any reasonable cause to believe. Yet the charge of the learned judge certainly went this far.

Judgment reversed, and *venire facias de novo* awarded.

In re Foot et al.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

If a creditor having a firm note indorsed by one partner and holding property of the partner as security, obtains payment by a sale of the security after the commencement of the proceedings in bankruptcy, the separate creditors are entitled to receive from the joint fund a sum equal to the dividend on the note.

In re NORMAN B. FOOT et al.

Messrs W. & J. D. Kernan, for petitioners.

Messrs Dennison & Everett, for assignee.

WALLACE, J.—For the purpose of raising money for the firm of Foot, Doud & Co., the above named bankrupt, Foot, one of the firm, indorsed their paper, and pledged securities belonging to himself individually as collateral for payment of the paper. After the adjudication of bankruptcy herein the holders of the notes sold the securities thus pledged, and realized upon the sale the sum of eighteen thousand two hundred and eighty-one dollars, being one hundred and four dollars in excess of the amount due upon the notes. The separate creditors of Foot now represent that his separate estate is insufficient to pay his individual debts, and insist that the amount realized from the securities thus sold be appropriated from the fund belonging to the joint estate to that of the separate estate of Foot. They maintain that it was the duty of the assignee in bankruptcy to have exonerated the separate estate from the lien of the pledgees out of the funds of the joint estate; and they urge, that in any event, Foot, as surety for the firm, when the notes were paid by the sale of his property, became subrogated to the claims of the holders of the notes, and entitled to prove the amount of the notes against the joint estate, and that this demand inures to the benefit of his separate estate, which should be credited by the assignee with ratable dividends on the amount.

There are technical difficulties in the way of obtaining relief upon either of these theories. The assignee would not have been justified in applying the moneys of the joint estate:

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to discharge a lien upon the property of the separate estate, even where the lien was created for the benefit of the firm; and if Foot as surety became subrogated to the rights of the holders of the notes, and therefore entitled to prove their amount, the rule which precludes a partner from proving his individual debt in competition with the joint creditors, would defeat the separate estate from deriving any benefit through the claim of Foot. But it seems clear that the equities of the separate creditors can be worked out upon familiar principles, and a result attained, which, in view of the condition of the two estates, is highly desirable.

Where there are two classes of creditors having a common debtor who has several funds, and one class of creditors can resort to all the funds while the other can resort only to part of them, the former shall take payment out of the fund to which they can resort exclusively, so that both classes may be protected; and if the former resort to the fund common to both classes, to the loss of the latter, the latter are entitled to be substituted to the extent of the deprivation to which they have been subjected in the place of the former. This principle has been frequently applied where specific liens exist in favor of different creditors upon property of the same debtor; and the rule is the same where the parties are creditors of different debtors, where as between the debtors equity demands that one of them should discharge the debt in exoneration of the other. (*Dorr v. Shaw*, 4 John. Ch., 17; *Story's Eq.*, Sections 642, 643; *ex parte Kendall*, 17 Ves., 513; *Neff v. Miller*, 8 Barr, 347; *Stirling v. Brightbill*, 5 Watts, 229.) The doctrine applies in all cases of marshaling equitable assets; and its application to assets in bankruptcy, which are to be administered upon equitable principles, is peculiarly appropriate.

In the present case, after the adjudication of bankruptcy the holders of the notes might have surrendered the collaterals and resorted to either of the funds to obtain payment; as creditors of the firm they could have proved against and shared in the joint estate, and as creditors of Foot they could have proved against and shared in his separate estate; and

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if they had surrendered, the collaterals would have inured to the benefit of the separate estate, because the firm were the primary debtors and Foot was a surety. The holders of the notes could not have been compelled to elect as to which fund they should pursue, the rule in England, which requires creditors both of the joint and separate estate in bankruptcy to elect, not obtaining here (*ex parte Farnum*, 6 Law Rep., 21; *Meade v. Nat. Bk. of Fayetteville*, 2 N. B. R., 173; *Emery v. Canal Nat. Bk.*, 7 N. B. R., 217); the joint creditors therefore could not have been heard to complain if the holders of the notes had chosen to obtain satisfaction out of the joint estate, and no equities exist on their part to countervail these of the separate creditors of Foot. On the other hand, if the holders of the notes had surrendered their collaterals and resorted to the separate estate of Foot by proving their claims in bankruptcy, the creditors of his separate estate would have been entitled to be substituted in the place of the holders of the notes, and allowed to prove the notes against the joint estate.

The rights of the parties are not changed because the holders of the notes satisfied them by a sale of the securities, instead of resorting to the joint estate in bankruptcy. By the course taken the separate estate has been diminished to the extent that satisfaction might have been obtained from the joint estate, and to that extent the separate creditors have been deprived of a fund to which they were entitled to equitable priority, as against a class of creditors who had resort to another fund, which was, as between the debtors, the primary fund for payment. Upon the principles referred to, the separate creditors are to be substituted to the rights of the holders of the notes to enforce payment from the joint estate in bankruptcy. The technical satisfaction of the notes by the proceeds of the sale of the securities does not stand in the way, for payment will not be permitted in equity to operate as an extinguishment as against those equitably entitled to substitution in the place of the party receiving payment (*Eddy v. Traver*, 6 Paige, 521; *Morris v. Oakford*, 9 Barr, 498; *Richardson v. Washington Bank*, 3 Metc., 536).

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Applying these principles to the present case, a result is reached which does no injustice to either class of creditors, and which affords a signal illustration of the benign vigor of the rules of equity. The assets of the primary debtors will be appropriated to the ratable payment of all their creditors, and those of the separate partner to his creditors; while the holders of the notes, protected in the exercise of their rights, will have so enforced them as not needlessly to prejudice the rights of other creditors.

A decree is ordered, that the assignee appropriate to the separate estate of Foot the surplus arising upon the sale of the securities, and such further sum as may arise from the dividends of the joint estate, as upon a debt proved against such joint estate of eighteen thousand one hundred and seventy-seven dollars accruing as of the date of the sale of the securities.

UNITED STATES CIRCUIT COURT—MASSACHUSETTS.

The bankrupt is not a competent witness in a criminal proceeding against him under Section 5132. The Act of 22d June, 1874, Section 8, only applies to civil causes.

UNITED STATES v. JAMES B. BLACK et al.

Fox, J.—The defendants, doing business at Lynn, as co-partners with one Osgood, under the style of Black, Currier & Osgood, having been adjudged bankrupts at the present term were indicted for violation of the provisions of the 44th Section of the Bankrupt Act, by secreting and concealing a large amount of money belonging to their estate, and, also, by fraudulently omitting the same from their schedules. At the trial, the defendants were called as witnesses, but being objected to, were excluded, and having been found guilty, they now move for a new trial, claiming that they were wrongfully excluded.

Reliance is placed by the learned counsel of the defend-

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ants, on a provision found in the act amendatory of the Bankrupt Law, approved June 22, A. D., 1874, Chapter 390, Section 8, by which it is declared that the following words shall be added to Section 26 of said act; "That in all causes and trials, arising or ordered under this act, the alleged bankrupt and any party thereto shall be a competent witness."

In 11 Wheaton, 385, the Supreme Court decided "That all acts *in pari materia* are to be taken into consideration, and considered as one act, in explaining their meaning and import," and in 14 Peters, 198, Taney, C. J., says; "It is undoubtedly the duty of the court to ascertain the meaning of the Legislature, from the words used in the statute, and the subject-matter to which it relates, and to restrain its operation within narrower limits than its words import; if the court are satisfied that the actual meaning of its language would extend to cases which the Legislature never designed to embrace in it."

The rules of the common law, as to the competency of witnesses, in the federal courts, were first modified by the Act of Congress, approved July 10, 1862, Chap. 189, by which it was provided "that the laws of the States in which the court shall be held shall be the rules of decision, as to the competency of witnesses in the courts of the United States, in trials at common law, equity, and admiralty;" and in 1864, by Chap. 210, Section 3, Congress further enacted "that in the courts of the United States there shall be no exclusion of any witness, on account of color, nor in any *civil action*, because he is a party to or interested in the issue tried," and these provisions were re-enacted by Section 858 of R. S.

Soon after the passage of these acts, it was held in this circuit, by Mr. Justice Clifford, that the law was not thereby changed as to the competency of defendants as witnesses in criminal causes, and they have never been received as witnesses; and this view was sanctioned by the Supreme Court of the United States, in 9 Wall., 655, *Green v. The United States*. It is also well understood, that the attempt has been repeatedly made, but without success, to induce Congress to

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modify the law in this behalf, and allow persons under indictment to be examined as witnesses on the trial.

Soon after the passage of the Bankrupt Law of 1867, the question arose, in various districts, as to the competency of the alleged bankrupt, in trials relating to his bankruptcy, and it was claimed, with force and plausibility, that the modifications of the law, as to the competency of parties as witnesses, were not broad enough to reach parties to proceedings in bankruptcy; as it was urged, that a petition in bankruptcy, with the proceedings under it, was not either a case at common law, or in equity, or admiralty, and so was not within the operation of the Act of 1862, nor was it strictly a *civil action*, so as to fall within the Act of 1864; the argument being, that it was in fact a matter *sui generis*, a proceeding in bankruptcy, under the Constitution of the United States, and the Bankrupt Act, passed in pursuance thereof, and that the provisions of law, under which these proceedings in bankruptcy were instituted, not being in force when the modifications of the rules of evidence were established by the Acts of Congress, proceedings in bankruptcy were not within the purview of the acts, or subject to their operation.

I am advised, that in this district, it was frequently claimed that bankrupts were not competent witnesses in these proceedings in bankruptcy, but it never received the sanction of the court; some of the trials, in the administration of the Bankrupt Law, being considered as coming within the provisions of the act relative to trials at common law, while others, perhaps, more properly fell under the class of trials in equity. It is well known, that this construction of the law did not meet with the ready approval of all of the courts administering the Bankrupt Act, and it is believed that in some districts, alleged bankrupts were not received as witnesses.

It appears, from the Congressional Record of the Senate, of Feb. 3, 1874, that the chairman of the committee which reported the act amendatory of the Bankrupt Law, in explanation of the provisions now under consideration, stated as follows;

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"In the 3d Section of our amendments, we have provided merely for the competency of all parties as witnesses, in suits by or against the assignee or bankrupt, respecting disputes touching the estate. The rules of law upon this subject, in the different States are different, and it was open to some question, whether the existing statutes of the United States, making parties witnesses in all cases, would necessarily cover all these bankrupt questions, and this measure is a mere formal enunciation of what probably the law is now."

Such being the avowed design of Congress, and it not being its intent to so modify the law as to admit the defendant to testify in a criminal cause, but merely to make certain and clear of doubt, by a *declaratory* enactment, the law on this subject as it then was, is it incumbent on the court, by reason of the language employed by Congress in the act, to extend it beyond what Congress in fact intended to accomplish? Congress had never been willing to admit defendants in criminal cases to testify, and no good reason is apparent why any exception should be made in criminal trials arising under the Bankrupt Act. It was claimed, at the argument, that the present case demonstrated the occasion and propriety of the change, as these defendants alone had full knowledge of the appropriation and use made by them of the money they were charged with secreting and concealing from their assignee; but in all cases where a party is indicted for a violation of the law, he might with equal propriety claim, that by his own testimony he could afford the most satisfactory explanation of the circumstances presented against him as proof of his guilt, and to this extent, Congress has never been willing to yield its assent.

It will be observed that the provision now under consideration was designed by Congress expressly as an amendment to Section 26 of the Bankrupt Act. This section, it appears, relates to the examination of bankrupts, and also authorizes compulsory process for the attendance of other parties as witnesses in the course of the proceedings in bankruptcy; but nowhere is there found contained in it any provision

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which can in any way be made applicable to criminal proceedings ; these are all provided for in the 44th Section, and from the collocation of this amendment, by adding it to the 26th Section, which wholly refers to matters not criminal in their character, it may well be inferred as intended to have reference solely to matters *ejusdem generis*, those of a civil nature, and not in any respect as designed to have relation to criminal proceedings.

It is said that the usual ordinary signification of the language found in this amendment, viz. : " That in all causes and trials arising or ordered under this act, the alleged bankrupt and any party thereto shall be a competent witness," embraces the case of a defendant in a criminal prosecution under the 44th Section of the law. It is quite manifest that the words, " trials ordered under this act," were designed to apply to the various trials which the act itself specially contemplates may be ordered by the court, in the course of the proceedings in bankruptcy ; such as whether an act of bankruptcy has or not been committed by the party, or whether under the 31st Section he is entitled to a discharge when opposed by his creditors. In these cases a jury trial may be ordered by the court, and this amendment would allow the party to be examined as a witness.

It is also declared by the amendment " that in all *causes* arising under this act, the alleged bankrupt, and any party thereto, may be a witness." A *cause* may undoubtedly be either of a civil or criminal nature, and the present indictment not only arises from a violation of the 44th Section of the act, but it derives its entire stay and support from that section, and from none other whatever. It must, therefore, be admitted that these words are sufficient to include the present cause, and that, without any forced construction, the letter of the amendment would have authorized the court to receive the defendants as witnesses ; but as was said by Parke, B., in 1 M. & W., 101, *Lyde v. Bennard*, " words may be construed in a sense different from their ordinary ones when the act is intended to remedy some existing mischief,

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and such a construction is required to render the remedy effectual; for we must always construe an act so as to suppress the mischief and advance the remedy. We must, therefore, endeavor to ascertain what the mischief to be remedied was; the framers of this act have not enabled us to determine this by any recital in the section itself, and we are, therefore, left to infer it from our knowledge of the state of the law at the time, and of the practical grievances generally complained of." It appearing that uncertainties previously did exist on this matter, and that the purpose of Congress was to remove these uncertainties, and in the language of Senator Edmunds, "to provide merely for the competency of all the parties as witnesses in suits respecting disputes concerning the estate," the court feels fully authorized to limit the operation and effect of the language found in the act, to the suppression of the mischief contemplated by Congress, and not to so extend it so as to reach a class of cases which Congress had on various occasions refused to relieve and provide for by any such legislative sanction as it is now claimed this amendment has afforded them.

The construction of this provision of the act being novel and important, I have felt authorized to consult with Mr. Justice Clifford in relation to it, and am authorized by him to say that he concurs in this opinion.

Motion overruled.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The power of the Justices of the Supreme Court to prescribe fees, commissions, charges, and allowances for the officers in bankruptcy is plenary, with the limitation that the fees cannot exceed the rate allowed by law at the time of the enactment of the Revised Statutes for similar services in other proceedings. Rule XXX applies to services rendered before its adoption. For the custody of property taken under a provisional warrant, the marshal is entitled to be allowed what is necessary and actually disbursed and paid by him to a keeper, not exceeding two dollars and fifty cents a day.

The allowance of two dollars and fifty cents can be made for the services of

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only one keeper. The marshal is not entitled to an allowance for the custody of property, by way of commissions on its value. If the marshal receives money belonging to the estate, he is entitled to a commission of one per centum on the first five hundred dollars, and of one-half of one per centum on the excess over five hundred dollars.

The marshal is entitled to one dollar per hour for the time of persons whom he employs in taking an inventory. The marshal is entitled to the allowance for the time of a party employed in taking an inventory although that party also acted as keeper and received fees therefor.

No allowance can be made for the time spent in verifying the inventory, with the assignee.

The allowance for the personal attention of the marshal in taking care of property, can be made only when he himself in person actually and necessarily gives his personal attention, and does not cover personal attention by a deputy.

The marshal may charge ten cents a folio for a copy of the inventory furnished to the assignee.

The marshal is entitled to a commission of two per cent. on the disbursements made by him.

In re JOHN J. JOHNSTON and EDWARD J. HALL.

James C. Carter, for the Marshal.

Henry Stanton, for John J. Johnston.

BLATCHFORD, J.—In this case, which is one in involuntary bankruptcy, a provisional warrant was issued to the marshal, on the 21st of December, 1874. On the same day, one Newcome was deputed by the marshal to execute the warrant, and took possession thereunder of the property of the bankrupts contained in their stores, being the first floors and basements of two buildings, and the second floor of one of those buildings. At the time Newcome took possession of such property, it consisted of a large stock of merchandise, being hats, caps, furs, gloves, umbrellas, parasols, traveling bags, millinery goods, etc., and the fixtures and furniture of the stores, and seventy-nine dollars and eighty-one cents in cash. The cost of the merchandise was said to be seventy thousand dollars. The two buildings were occupied, in part, by other tenants, whose apartments were separated from the apartments of the bankrupts by a board partition, which extended about three quarters of the distance from the floor to the ceiling of said apartments. Said stores were also accessible by doors and windows opening upon two streets. Newcome, on the day he

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so took possession of the property, placed one Poinier in charge of it, to assist him in watching and taking care of it. Poinier remained in charge of it, with Newcome, until the 19th of February, 1875. During all that time Poinier faithfully discharged the duty required of him. After taking possession of the property, Newcome employed Poinier and three persons, named West, Butler, and Draper to assist him in taking an inventory of the property. Newcome and those four persons were so employed on nine days in December and January; Newcome and Poinier being so employed for ten hours on each of said nine days, West for eight hours on each of said nine days, and Butler and Draper for not less than six hours, on an average, on each of said nine days. In addition, Newcome was at the stores of the bankrupts, on every day, except eight days, until the 13th of February, while the property was in his possession, including Christmas and Sundays. On each and all of such days, including Christmas and Sundays, Newcome was actually and necessarily employed in giving his personal attention to the proper care of the property of the bankrupts for two hours of each day. On the 13th of February, Newcome, with the assistance of Poinier, commenced to turn over the property to the assignee in bankruptcy, and to assist the assignee in verifying the inventory of it, which Newcome had taken, and was so employed for six days, on each of which Newcome and Poinier were actually and necessarily employed for ten hours. The inventory contained seventy-five folios, and a copy of it was furnished to the assignee. While the property was in the custody of Newcome, he received various checks and drafts, representing money due to the estate of the bankrupts, which were collected by the marshal, to the amount of six thousand six hundred dollars, and which money was afterwards turned over to the assignee.

The affairs of the bankrupt estate having been settled, and the property having been returned by the assignee to the bankrupt Johnston, subject to the payment by him to the marshal of the fees of the marshal for his services in the mat-

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ter, a bill of such fees has been taxed by the clerk, under a special order. Each party appeals.

Item one. The clerk disallowed a charge for sixty-one days services of Newcome in taking care of the property, from December 21st to February 19th, at two dollars and fifty cents per day, one hundred and fifty-two dollars and fifty cents. The objections taken to it were, that it was not warranted by the fee bill in force at the time of the taxation, May 28, 1875, and that it was, in fact, an item for taking an inventory. The clerk sustained the objections, and the marshal appeals. The marshal contended, before the clerk, that the bill should be taxed under the provisions of law, and the Rules in force at the times the several services were rendered, all of them having been rendered prior to the 12th of April, 1875, when the new General Orders in bankruptcy were adopted. For Johnston, it was contended, before the clerk, that the bill should be taxed entirely under the provisions of Rule 30 of the new General Orders. The clerk ruled that the proceedings in bankruptcy were still pending, and that, therefore, the taxation must be controlled by the provisions of law, and the General Orders in force at the time of the taxation.

Item two. The bill charged one hundred and fifty-two dollars and fifty cents, for like services of Poinier with those charged for Newcome in item one. The clerk allowed one hundred and fifteen dollars of the item, and disallowed thirty-seven dollars and fifty cents, such disallowance being for fifteen days services at two dollars and fifty cents per day, and being based on the ground that such services were included in items seven and eight, for taking and verifying inventory. Both parties appeal. The grounds of objection taken to the allowance of any part of the item were those taken to item one, and, also, that the services were not necessary, and that Poinier rendered no services as keeper.

Item three. The clerk disallowed a charge of twenty dollars, for the services of West, one of ten dollars, for the services of Butler, and one of ten dollars, for the services of

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Draper. The marshal appeals. The grounds of objection taken to the allowance of any part of this item, were those taken above, and, also, that the services were included in the item for taking inventory.

Item four. The clerk disallowed a charge of one thousand one hundred dollars for custody of property, being two and a half *per cent.* on five thousand dollars, one hundred and twenty-five dollars; and one and a half *per cent.* on sixty-five thousand dollars, nine hundred and seventy-five dollars. The marshal appeals. The ground of objection taken to the allowance of any part of this item was, that it was not authorized by the new General Orders.

Item five. The clerk allowed one hundred and sixty-six dollars, as commissions on moneys received, being six thousand six hundred dollars, as follows; one thousand dollars at five *per cent.*, fifty dollars; four thousand dollars, at two and a half *per cent.*, one hundred dollars; one thousand six hundred dollars at one *per cent.*, sixteen dollars. Johnston appeals. The ground of objection taken to this allowance was, that the charge was not authorized by the law or by the new General Orders.

Item six. The clerk disallowed a charge of three hundred and fifty-two dollars and fifty cents, as commissions on the value of the property, at seventy thousand dollars, as follows: five hundred dollars at one *per cent.*, five dollars; sixty-nine thousand five hundred dollars at two and a half *per cent.*, three hundred and forty-seven dollars and fifty cents. The marshal appeals. The objection to this item was a general one.

Item seven. The clerk allowed three hundred and sixty dollars for taking inventory, being three hundred and sixty hours at one dollar per hour. Johnson appeals. The ground of objection taken to this item was that it was subject to a deduction of the amount before allowed to Poinier. The clerk ruled that the time of Poinier included in this item was deducted from his allowance.

Item eight. The clerk allowed one hundred and twenty

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dollars for verifying inventory with assignee, being for one hundred and twenty hours at one dollar per hour. Johnson appeals. The objection taken to this item was that it was not provided for by the law or the new General Orders. The marshal explained, that the item was a more full specification of the personal attention of the marshal in taking care of the property. He referred probably to item nine.

Item nine. The clerk allowed sixty dollars for personal attention for sixty hours, at one dollar per hour. Johnson appeals. The objection taken to this item was, that no personal attention had been proved other than what had been allowed for. The only other allowance for personal attention is what is embraced in some one or more of the foregoing items.

Item ten. The clerk allowed seven dollars and fifty cents for copy of inventory, being for seventy-five folios, at ten cents per folio. Johnson appeals. No ground of objection to this item was stated.

Item eleven. The clerk allowed four dollars and eighty-two cents, being two *per cent.* commission on two hundred and forty-one dollars, allowed for disbursements. Johnson appeals. No ground of objection to this item was stated.

The Revised Statutes were in force when the services in this case were rendered. Section 5126 provides as follows in regard to fees to the marshal, as messenger, after prescribing, in three items, specific fees to him, for service of warrant, and for travel, and for written notices to creditors: "Fourth. For custody of property, publication of notices and other services, his actual and necessary expenses, upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed and adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of such expenses. For cause shown, and upon hearing thereon, such further allowance may be made, as the court in its discretion may determine."

Section 4990 of the Revised Statutes, as amended by

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Section 18 of the Act of June 22, 1874, provides that the Justices of the Supreme Court may, from time to time, subject to the provisions of the Title in regard to bankruptcy, rescind or vary any of the General Orders in bankruptcy theretofore adopted by them, as then existing, and may frame, rescind, or vary other General Orders, "for regulating the fees payable and the charges and costs to be allowed with respect to all proceedings in bankruptcy before such courts" (the District Courts in bankruptcy), "not exceeding the rate of fees now allowed by law for similar services in other proceedings."

Section 5127 of the Revised Statutes, provides that the enumeration of the fees in Section 5126 shall not prevent the Justices of the Supreme Court from prescribing a tariff of fees for all other services of the officers of Courts of Bankruptcy, or from reducing the fees presented in Section 5126 in classes of cases to be named in their General Orders.

Section 18 of the Act of June 22, 1874, provides, that, from and after its passage, "the fees, commissions, charges, and allowances, except actual and necessary disbursements, of and to be made by the officers, agents, marshals, messengers, assignees, and registers, in cases of bankruptcy, shall be reduced to one half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases, provided that the preceding provision shall be and remain in force until the Justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by" Sections 4990 and 5127 of the Revised Statutes, "and no longer, which duties they shall perform as soon as may be."

Under these provisions the power of the Justices of the Supreme Court to prescribe fees, commissions, charges, and allowances for the officers, agents, marshals, messengers, assignees, and registers, in cases of bankruptcy, is plenary, with the limitation that the fees cannot exceed the rate allowed by law, at the time of the enactment of the Revised

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Statutes, for similar services in other proceedings. Prior to the enactment of Section 18 of the Act of June 22, 1874, their power in this respect was further restricted, so that they could not alter the fees established by the statute or by law, but that restriction was removed by that section.

Under the power thus conferred upon them, the Justices of the Supreme Court promulgated, on the 12th of April, 1875, a new General Order, No. 30, in regard to fees, which provides as follows: "The fees of the marshal shall be the same as are allowed for similar services by the general fee bill in Section 829 of the Revised Statutes, as modified by Section 5126, including additional fees allowed by the latter section for distinct services, but no allowances shall be made under the last clause of Section 5126, commencing with the words: 'For cause shown.'" The new General Order, No. 30, then goes on to prescribe specific fees for three other distinct services of the marshal, and then adds: "No other allowance to be made for custody of property, except for actual disbursements, which shall in all cases be passed upon by the court."

The provisions in regard to the fees of the marshal are thus entirely plain. His fees for services are to be the same as are prescribed by Section 829 of the Revised Statutes for "similar services," as modified by Section 5126, including the additional distinct fees allowed by Section 5126. The expression "similar services," according to the use of those words in Section 4990 of the Revised Statutes, means, in the new General Order No. 30, "similar services in other proceedings." But the fees to be allowed are all to be specific fees, prescribed by statute and by the new General Order No. 30, and the power of the court to make further discretionary allowances is taken away. Furthermore, in respect to custody of property by the marshal (except as regards the marshal's personal attention, hereafter referred to), actual disbursements only are to be allowed to be passed upon by the court. The items in question in this case must be disposed of according to these rules.

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Item one. The sixty-one days' services of Newcome, charged at two dollars and fifty cents per day, were for custody of the property. The marshal cannot be allowed anything for the services of a keeper or deputy, in taking care of property, unless he has actually paid it. But it does not follow that he should be allowed all he has paid, or that he can be allowed anything merely because he has paid it. The taking of property under a provisional warrant in bankruptcy is an analogous or similar service to that of serving an attachment *in rem*, on a libel in admiralty. Section 5126 allows two dollars for the service of a warrant. Section 829 allows two dollars for the service of an attachment *in rem*, in a libel in admiralty. Section 829 allows for the necessary expenses of keeping property, attached or libelled in admiralty, not exceeding two dollars and fifty cents a day. For the keeping or custody of property taken under a provisional warrant in bankruptcy, the marshal is, therefore, entitled to be allowed what is necessarily and actually disbursed and paid by him to a keeper or keepers, but the entire amount cannot exceed two dollars and fifty cents a day. By the vouchers rendered, the marshal appears to have actually paid to Newcome one hundred and fifty-two dollars and fifty cents, and to Poinier, one hundred and fifty-two dollars and fifty cents, being for sixty-one days' services of each, in taking care of the property, from December 21 to February 19, at two dollars and fifty cents per day. On the proof offered, the services of a keeper seem to have been proper and necessary. But, at the rate of two dollars and fifty cents per day, which is the rate the marshal adopted, allowance can be made for the services of only one keeper. This allowance should be for sixty-one days, and amounts to one hundred and fifty-two dollars and fifty cents. But, on the evidence, that amount should be allowed for the services of Poinier, as keeper, and not for any services of Newcome, as keeper. Item one was, therefore, properly disallowed.

Item two. I think the entire amount of one hundred and fifty-two dollars and fifty cents, should be allowed for the

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services of Poinier, in taking care of the property. If Poinier was employed, during any part of the same time, in taking an inventory, and is entitled to be paid for taking the inventory, that ought not to diminish his allowance for taking care of the property.

Item three. The forty dollars, covered by item three, was properly disallowed. Nothing can be allowed for the services of West, Butler, and Draper, except in taking the inventory, and the allowance, therefore, must be made under that head.

Item four. The charge of eleven hundred dollars for custody of property, by way of commissions on its value of seventy thousand dollars, was properly disallowed. It was not a disbursement, nor is it a charge by the hour for personal attention of the marshal in taking care of the property. Its allowance is, therefore, expressly forbidden, by the provisions of the new General Order, No. 30, before cited.

Item five. The clerk appears to have allowed commissions on the six thousand six hundred dollars, at the rate allowed by Section 5100 of the Revised Statutes, to assignees, as an allowance for their services, in the shape of a commission on moneys received and paid out by them. I can find no warrant for this allowance. If there is a fee allowed by Section 829 of the Revised Statutes, for a similar service, such fee is allowable for receiving and paying over the six thousand six hundred dollars. Section 829 allows to the marshal, for serving final process, seizing, or levying upon property, advertising and disposing of the same by sale or otherwise, according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed, for similar services, to the sheriffs of the States, respectively, in which the service is rendered. Here there was no final process, and no sale, and nothing to which the term "poundage," as that word is properly understood, is applicable. So, too, Section 829 allows to the marshal for the sale of property in admiralty, and for receiving and paying over money, two and a half *per cent.* on any sum under five hundred dol-

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lars, and one and a quarter *per cent.* on the excess of any sum over five hundred dollars. But here there was no sale of property. Section 829 also provides that, "when the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one *per centum* on the first five hundred dollars of the claim or decree, and one-half of one *per centum* on the excess of any sum thereof, over five hundred dollars, provided that, when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof." The theory of this allowance is, that the marshal has, in an admiralty suit *in rem*, attached the property, and holds it, and that then, without a sale of the property by the marshal, the controversy is so disposed of by the parties that the marshal is called upon to give up possession of the property, so that he loses the fees for selling it, and for receiving and paying over the money. In such a case, he is allowed a commission, which is intended as a compensation for his risk and responsibility, just as the poundage allowed on final process, and the percentage allowed on a sale of property in admiralty, are each of them a compensation for risk and responsibility, not merely in selling the property, but in holding possession of it under process. Personally, he can have no other compensation for keeping safely the property, for the expense of keeping it, not exceeding two dollars and fifty cents a day, can be allowed only when paid to a keeper. The new General Order, No. 30, superadds compensation by the hour, for personal attention, when actually and necessarily employed in taking care of the bankrupt's property. I think that the service of the marshal in this case, in respect to the six thousand six hundred dollars, is a similar service to that he renders in admiralty, in regard to property of like value, which comes into his hands under an attachment *in rem*, and that he is entitled to a like fee, being a commission on the six thousand six hundred dollars, of one *per cent.* on the first five hundred dollars, and one-half of one *per cent.* on six thousand one hundred dollars. The commis-

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sion is given by Section 829, for the service of the marshal, in respect to the property which he relinquishes, in taking the risk and responsibility which he takes in regard to it, while he holds it. The allowance to him should, therefore, have been thirty-five dollars and fifty cents, instead of one hundred and sixty-six dollars.

Item six. The views stated under the head of item five apply to the merchandise, valued at seventy thousand dollars, as well as to the six thousand six hundred dollars collected, and the charge of three hundred and forty-seven dollars and fifty cents ought to be allowed.

Item seven. The new General Order, No. 30, provides that "the marshal shall be allowed for each hour necessarily employed in making inventory of bankrupt's property" one dollar. The evidence shows that three hundred and sixty hours were employed in taking the inventory. The marshal has a right to be allowed one dollar per hour for the time of persons whom he employs to take an inventory, which is necessarily employed in taking it. I see no reason why the marshal should not be allowed for the ninety hours during which Poinier was employed in taking the inventory, even though Poinier be allowed fees as keeper for the same time. Poinier supplied, in taking the inventory, the place of another person, and was discharging the duties of keeper at the same time.

Item eight. I see no authority for the allowance of the charge for time spent in verifying the inventory with the assignee.

Item nine. I do not think anything should be allowed for personal attention. The allowance given by the new General Order No. 30, is an allowance to "the marshal" "for each hour actually and necessarily employed in personal attention in taking care of bankrupt's property." This is, I think, an allowance to be made only when the marshal himself, in person, actually and necessarily gives his personal attention in taking care of the bankrupt's property, and that it does not cover personal attention by a deputy. If it could be con-

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strued to cover personal attention by a deputy, several deputies might be detailed to take care of property, and might give their personal attention, and show that they were actually and necessarily employed, and the allowance therefor at one dollar per hour, for day and night, would swell to an extravagant amount what would really be an allowance for custody of property, and for the expense of keeping property, when such allowance is, as has been shown, carefully restricted by other provisions. In the present case, it is not shown that the marshal himself gave any actual personal attention in taking care of the property.

Item ten. I think the copy of the inventory furnished to the assignee was properly charged for, at ten cents a folio. Section 829 of the Revised Statutes allows to the marshal for copies of papers furnished at the request of any party, ten cents a folio. In this case the copy was furnished to the assignee, and as he received it, it must be regarded as having been furnished at his request.

Item eleven. Section 829 of the Revised Statutes allows to the marshal, "for disbursing moneys to jurors and witnesses, and for other expenses, two per centum." This authorizes the charge of a commission of two *per cent.* on the disbursements made by the marshal for the items of expenses allowed in the bill as taxed. The clerk allowed two *per cent.* on two hundred and forty-one dollars, that being the amount of disbursements he allowed. The disbursements I allow are two hundred and seventy-nine dollars and thirty-two cents, on which a commission of two *per cent.* is five dollars and fifty-nine cents.

From the foregoing conclusions it results that the bill should be taxed at one thousand and sixty-seven dollars and thirty-six cents instead of nine hundred and ninety-two dollars and nine cents, and I so tax it.

In re Milwain.

UNITED STATES DISTRICT COURT—OREGON.

At the first meeting of creditors in the case of voluntary bankrupt, proofs of certain claims against the estate were presented, but the names of the alleged creditors did not appear on the bankrupt's schedule. *Held*, that the circumstance was sufficient to raise a doubt as to the validity of such claims within the meaning of Section 5088 of the R. S., and ordered that the proofs be postponed until after the election of an assignee.

In re MILWAIN.

M. W. Fecheimer, for motion.

Joseph Simon, contra.

DEADY, J.—On June 19, 1875, Elijah Milwain was adjudged a bankrupt in this court, upon his own petition. At the first meeting of creditors, on July 6, the creditors Hotaling & Co., and Goldsmith and Loewenberg, moved to postpone the proofs of the claims of Greene, Carleton and Keith, whereupon the question, "Shall this motion be allowed?" was certified by the Register to the judge for decision.

As appears from the statement of the Register, the grounds of the motion are that the names of these alleged creditors do not appear on the bankrupt's schedule, and their alleged claims appear to be based upon running accounts, the items of which are not stated. Section 5085 of the R. S. provides: that "When a claim is presented for proof before the election of the assignee, and the judge or Register entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen."

The claim of Keith is for merchandise sold and delivered at different times specified, between May 6, 1871, and June 15, 1875, amounting to nine hundred and ninety-seven dollars and twenty-four cents, upon which the credits amount to nine hundred and twenty-eight dollars and fifty-two cents, leaving a balance in favor of Keith of sixty-eight dollars and seventy-two cents.

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Carleton's claim is for merchandise sold and delivered between April 27 and September 20, 1874, amounting to two hundred and twenty-eight dollars, with a credit of one hundred and sixty-four dollars and fifty-six cents, leaving a balance of sixty-three dollars and forty-two cents.

Greene's claim is stated to be for merchandise and money loaned between November 1, 1872, and June 15, 1875, amounting to one thousand one hundred and ninety-eight dollars and fifty-eight cents, with a credit of two hundred and fifty-three dollars and seven cents, leaving a balance of nine hundred and forty-five dollars and fifty-one cents.

Under these circumstances I think there is good reason to doubt the validity of these claims. Section 5015 of the R. S. requires the bankrupt to annex to his petition a schedule of his debts, containing the names of all his creditors and the nature of their demands, which schedule must be verified by his oath. The schedule in this case is silent as to these alleged creditors or their claims. In effect the bankrupt has thereby declared that he owes them nothing. It was his interest to speak the truth in the premises, for otherwise he might be denied his discharge, besides being liable criminally. True, he may have omitted these names from the schedule by mistake, and that may hereafter be shown. But there is no presumption that the schedule is incorrect in this particular, but the contrary.

In opposition to the oath of the bankrupt is the oath of each of these alleged creditors to their claims. They swear that their debts are valid and subsisting demands against the estate of the bankrupt. So far it is oath against oath, and that itself is sufficient to raise the doubt contemplated by the statute. But these creditors are interested witnesses. Their interest is to establish their claims. But the interest of the bankrupt in the matter, so far as he has any, is on the side of the truth. The affidavit of the bankrupt, and any one of these creditors, is of equal weight as evidence, except so far as the circumstances under which they testify tend to affect their credibility. As has been said, the affidavit of Milwain

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is that of a disinterested party, at least, while those in support of these claims are made by interested parties.

Again, it is a material circumstance to be considered in this connection, that these claims are based upon open accounts, running through some years, which are not stated in items. Keith's claim, it is true, is stated in particulars, so far as the *date* of each article is concerned, but the nature of the article itself is not mentioned or specified otherwise than as "merchandise." But that is no specification of the article sold. For all the information conveyed by that word, the article might as well have been styled "sundries." But in the other two claims, there is neither a specification of the nature of the articles sold nor the dates of their delivery.

Notwithstanding these objections, these claims may be valid and entitled to be proved. But the circumstances being sufficient to raise a reasonable doubt as to their validity, the proofs may be postponed until an assignee has had an opportunity to examine them.

SUPREME COURT—MASSACHUSETTS.

The assignee is not entitled to twenty days' notice before the bringing of an action to recover property taken by him from the possession of the owner. The assignment is not a precept issued by the court, but a conveyance of the bankrupt's property, giving the assignee the mere right of ownership, but no authority, or color of authority, to take the property of strangers. A State court may entertain an action against an assignee for the tortious taking of property not in possession of the bankrupt and belonging to a stranger.

STEPHEN W. LEIGHTON v. JOSEPH A. HARWOOD et al.

REPLEVIN of four sewing-machines. The answer alleged that the machines were not the property of the plaintiff; that the defendants were assignees in bankruptcy of Cyrus G. Foss; that the machines were part of the bankrupt's estate; that, as such assignees, they took the machines, and were in possession of them when replevied; that if the machines were conveyed by Foss to the plaintiff, such conveyance was

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in fraud of the Bankrupt Act; that the plaintiff did not give the defendant twenty days' notice of the action; and that he could not maintain this action, as the defendants were in possession of the property as officers of the United States District Court.

At the trial in the Superior Court, before Wilkinson, J., it was admitted that a petition in bankruptcy was filed against Foss on November 10, 1870; that he was adjudged a bankrupt thereon on December 21, 1870; that the defendants were duly appointed his assignees on January 7, 1871; that the assignment to them was dated and duly executed January 20, 1871; that they were such assignees at the time the property was replevied; and that no notice whatever was given them of this action before it was brought.

The plaintiff testified that he bought the machines of Foss on October 1, 1870, and paid him for them in cash; that they were duly delivered to him; that at the time of the delivery they were in a shop that had been used by Foss as a stitching-shop; that Foss had hired the shop until November 1, 1870, and it was agreed that the machines should remain there, and be used by the plaintiff or his wife in doing work for Foss, until the tenancy expired; that on November 1 the plaintiff hired the shop and kept the machines there, where they were used by his wife, upon work furnished by Foss, and paid for by him, until January 23, 1871, when the defendants came, took possession of them, and removed them.

This writ was sued out on January 23, 1871, and was served on January 30. It appeared that at the time of the taking by the defendants, a few small articles belonging to Foss were in the same room, having never been removed by him.

It was admitted that the plaintiff gave the defendants no notice of his title until they came and took possession, when he informed them of the conveyance to him, and forbade the removal of the machines; and it was also admitted that when the defendants took possession of the machines, they did it claiming to have title as assignees of Foss.

The defendants asked the judge to rule that the plaintiff

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could not maintain this action: 1st. Because the court had no jurisdiction; and 2d. Because no notice was given as required by the Bankrupt Act; but the judge declined so to rule. The defendants then asked the judge to rule, "that if the defendants, as assignees of Foss, took possession of the machines, *bona fide* believing them to be part of the assets of Foss in bankruptcy, and under such circumstances that they might reasonably infer the same to be so, the plaintiff could not maintain this action;" but the judge declined so to rule, and instructed the jury that if they found the machines to be lawfully the property of the plaintiff, at the time of the replevin, and when taken possession of by the defendants, they might return a verdict for the plaintiff.

The jury returned a verdict for the plaintiff for nominal damages, and the defendants alleged exceptions.

G. W. Morse for the defendants.

First. The action cannot be maintained because no notice was given to the assignee.

Second. The United States Statutes of 1867, C. 176, Section 14, protects an assignee for what he does *bona fide* in pursuance of the statute. *Hughes v. Buckland*, 15 M. & W., 346; *Beechey v. Sides*, 9 B. & C., 806; *Rudd v. Scott*, 2 Scott N. R., 631; *Daniel v. Wilson*, 5 T. R., 1; *Horn v. Thornborough*, 3 Exch., 846; *Bird v. Gunsten*, 2 Chit., 459; *Prestidge v. Woodman*, 1 B. & C., 12.

Third. The State court has no jurisdiction of the action. The assignment relates back to the time of filing the petition, and "the assignee shall demand and receive from any and all persons holding the same, all the estate assigned or intended to be assigned under the provisions of" the Bankrupt Act. United States Statutes 1867, C. 176, Sections 14, 15. An assignee is an officer of the Bankrupt Court; one court cannot take property from the custody of an officer of another court. *In re Vogel*, 2 N. B. R., 427; s. c., 3 N. B. R., 198; *Livermore v. Cordway*, U. S. Dist. Ct. for Mass., February, 1871; *Freeman v. Howe*, 24 How., 450; *Peck v. Jenness*, 7 How. 612; *Williams v. Benedict*, 8 How., 107; *Wiswall v.*

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Sampson, 14 How., 552; *Peale v. Phipps*, *Ib.*, 368; *Taylor v. Carryl*, 20 How., 583; *Buck v. Colbath*, 3 Wall., 334; *Taylor v. The Royal Saxon*, 1 Wall., Jr., 311; *Cropper v. Coburn*, 2 Curt. C. C., 465; *The Oliver Jordan*, *Ib.*, 414; *Foster v. The Richard Busteed*, 100 Mass., 409; *Clifton v. Foster*, 3 N. B. R.; s. c., 103 Mass., 233.

S. B. Ives, Jr., and *S. Lincoln, Jr.*, for the plaintiff.

CHAPMAN, C. J. This is an action of replevin for four sewing-machines. The defendants took them January 23, 1871, and the jury have found that they were then the property of the plaintiff. It appears from the bill of exceptions that the plaintiff purchased them of Cyrus G. Foss on October 1, 1870, and paid him for them in cash. They were delivered to him in a stitching-shop of which Foss had a lease expiring November 1, 1870; and it was agreed that they should remain there, and be used by the plaintiff or his wife, in doing work for Foss, till his tenancy expired. On November 1 the plaintiff hired the shop and kept the machines there, where they were used by his wife upon work furnished by Foss, and paid for by him, till January 23, 1871, when the defendants came and took them away; this writ was sued out the same day, and served a few days afterwards. The machines were taken from the shop and possession of the plaintiff, and Foss had no possession of the shop, and only a few small articles of property in it, which he left there.

A petition in bankruptcy had been filed against Foss November 10, 1870; he had been declared a bankrupt December 21, 1870, and the defendants had been appointed his assignees in bankruptcy. It is to be taken for granted that they had an assignment of his property in the usual form, and it does not appear that they had any other authority or precept. They contend that the 14th Section of the Bankrupt Act (U. S. St. 1867, C. 176) applies to them, and protects them against liability to this action. This section provides that "no person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him

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as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so." They say that they took these machines as assignees of Foss, and that this section applies to this case.

But this is too broad an interpretation of the section. The assignment is not a precept issued by the court, but a conveyance of the bankrupt's property, giving the assignees the mere rights of ownership, but no authority, or color of authority, to take property of strangers. If it were otherwise, their power to take such property would be limited only by their own discretion; and the assignment might be made the instrument of gross oppression. It would be so in this case; for the defendants might dispose of the property before the lapse of the twenty days, and then tender amends. The plaintiff would thus be deprived of his right to an action of replevin to recover the specific property.

The case of *Edge v. Parker*, 8 B. & C., 697, is an authority on this point. It was trespass for breaking and entering the plaintiff's premises and seizing his goods. The defendant was assignee of Timothy Edge, a bankrupt, and the goods belonged to the bankrupt, as the jury found. The action was not brought within three months, and the defendant contended that he was protected by the Statute of 6 George IV., C. 16, Section 44, which provides "that every action brought against any person for anything done in pursuance of this act shall be commenced within three calendar months next after the fact committed." This raised the question whether the assignee of a bankrupt, who committed a trespass upon the property of another, could be regarded as acting in pursuance of the statute. The court held that the expression "in pursuance of," was applicable only where the party could be considered as founding his act upon the power given him by the Legislature; that the act did not give the assignee power to seize the goods of the bankrupt, but vested the property in him, and clothed him with all the rights

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resulting from the ownership of the property. The plaintiff's right of action was therefore held to be unaffected by the statute, and the action was maintained.

So in this case the defendants took as assignees only the rights resulting from the ownership of the bankrupt's property; and their taking the plaintiff's property tortiously did not deprive him of his right to the present action.

We do not think there is any force in the suggestion of the defendants, that the Bankrupt Act presumes that the assignees of bankrupts will be men of integrity and substance, and will not be inclined to do wrong. Obviously it did not intend to authorize them to encroach upon the rights of strangers to the proceedings, if they should be so inclined.

The case of *Freeman v. Howe*, 24 How., 450, is relied on by the defendants as authority, to the point that they are protected by the Bankrupt Act against this action. It was decided in that case that a United States marshal is not liable to an action of replevin brought in a State court to recover property that he holds by attachment, upon a writ issued from the United States Court. But his office is different from that of an assignee in bankruptcy, and his custody of attached property is of a different character from the custody of an assignee; and we do not think the doctrine of that case should be extended by analogy.

Nor is it material that the defendants honestly and reasonably believed that they were acting under the statute. The cases cited in which that belief has been held to be material are of a different class, where the exemption was directly provided for by acts of Parliament. But the Bankrupt Act does not purport to exempt any person from an action in the State courts for a tortious taking of property not in possession of the bankrupt, and belonging to a stranger. *In re Noakes*, 1 N. B. R., 592.

Exceptions overruled.

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UNITED STATES DISTRICT COURT—MICHIGAN.

In computing the *number* of creditors who must join in a petition for adjudication, creditors whose respective debts do not exceed two hundred and fifty dollars, are not to be reckoned; but in computing the *amount or value* of creditors all should be included. The aggregate of petitioner's debts must be equal to one-third of all the debts, irrespective of the amount, provable against the estate.

The nature of petitioner's debts should be so far stated in the petition that the court may see they are provable against the estate.

The depositions in proof of debt are intended to support the allegations of the petition, not to supply defects in them.

The forms prescribed by the Supreme Court should be followed as closely as the circumstances will permit.

Under the amendment of 1874 the general allegation that the debtor "being a merchant and trader, fraudulently stopped payment" is sufficient, without alleging that the stoppage was of commercial paper. The clause was intended to cover the fraudulent stoppage of the payment of debts generally.

Where a fraudulent stoppage of payment of commercial paper is alleged, the pleader may aver a general stoppage of payment without describing any paper, or he may aver the non-payment of a particular piece of paper, describing it, and rely upon it as *prima facie* evidence of a general stoppage.

Where a preference is alleged it is not necessary to state that such preference was in fraud of the Bankrupt Act, but the name of the person preferred should be set forth.

Where a petition is verified by an attorney, the non-residence of his principal should be alleged directly and not by way of recital.

The allegations in the deposition in proof of the act of bankruptcy should be made upon the personal knowledge of the deponent and should make out a *prima facie* case. Such allegations should be made by separate deposition and not in the petition itself.

Facts relied upon to justify a warrant of arrest and seizure should not be set forth in the creditors' petition.

In re JOSEPH F. HADLEY.

Mr. J. G. Dickinson, for the debtor.

Mr. W. S. Edwards, for the petitioning creditors.

ON exceptions to creditors' petition. The several grounds of exception are stated in the opinion of the court.

BROWN, J.—I shall proceed to dispose of the several exceptions in the order in which they are taken.

First. That it does not appear by the petition that the requisite number of creditors have joined.

The allegation in the petition is that the petitioners

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“constitute one-fourth in number of the creditors of the said Joseph F. Hadley, and that said above-mentioned indebtedness amounts to at least one-third of the debts provable against the said debtor, under the Bankrupt Act and the amendment thereto.”

Immediately following this, however, is the further allegation “that the indebtedness of the said Hadley, as shown by his books, and from statements made by him, amounts to upwards of fourteen thousand three hundred dollars.” The aggregate of debts set forth in the petition is four thousand seven hundred and fifty-three dollars and sixty-three cents, which is one-third of fourteen thousand two hundred and sixty dollars and eighty-nine cents. There is no statement as to the number of persons to whom the indebtedness of Hadley is owing, and the general allegation that the petitioners constitute one-fourth in number must be presumed to be true, and is sufficient; but by a comparison of the figures above given it appears that the aggregate of their demands does not equal one-third of the indebtedness as set forth in the petition.

It was suggested upon the argument that much of this indebtedness consists of debts of less than two hundred and fifty dollars in amount, and that the aggregate of petitioners' claims, being so nearly one-third of the entire amount, the court might presume there were enough debts below two hundred and fifty dollars which should be excluded to make the petitioner's one-third in amount. This argument is based upon the theory that in computing both the *number* and the *amount* of creditors, only those whose respective debts exceed two hundred and fifty dollars shall be reckoned. I am aware that such was the ruling of the learned Judge of the Southern District of New York, *In re Hymes*, 10 N. B. R., 433.

It was held in this case that where the petition was filed on behalf of creditors holding provable debts exceeding the sum of two hundred and fifty dollars, to ascertain whether the amount of provable debts held by them is equal to one-third in amount, only the provable debts of creditors which exceed two hundred and fifty dollars must be reckoned, and the re-

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quirement of the statute is satisfied if the debts due to such petitioning creditors equal one-third of the provable debts due to creditors holding provable debts exceeding the sum of two hundred and fifty dollars, and that it was not necessary that the amount of debts of the petitioning creditors should be equal to one-third of *all* the provable debts.

I was much struck with the force of the reasoning of the learned judge upon this question, but upon more mature consideration I find myself unable to concur in his opinion. I think a comparison of the several provisions of Section 39, as amended in 1874, indicates the design of Congress to exclude the smaller creditors only in estimating the one-fourth *in number* by personal enumeration, and that in computing the *amount* the aggregate of their debts must be equal to one-third of *all* the debts, irrespective of amount, provable against the estate. In mentioning the proportion of creditors who must join in instituting or compromising proceedings in bankruptcy, the word "number" is constantly used in contra-distinction to "amount." For example, in speaking of cases commenced since December, 1873, the same section provided that "if such allegation as to the *number or amount* of petitioning creditors be denied by the debtor," the court shall require him to file forthwith a full list of his creditors, and ascertain whether "one-fourth in *number* and one-third in *amount*" have petitioned; but if the debtor "shall admit in writing that the requisite *number and amount* of creditors have petitioned," the court shall so adjudge, "and if it shall appear that such *number and amount* have not so petitioned," the "court shall grant time within which others may join;" and if at the expiration of the time so limited the *number and amount* shall comply with the requirements of this section, "the matter may proceed, but if such *number and amount* shall not answer the requirements of the section the proceedings shall be dismissed." Near the close of the section follows the provision in question. "In computing the *number* of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and

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fifty dollars shall not be reckoned." If Congress had designed to exclude the smaller creditors in computing the *amount* who should join, it seems very singular they should not have used the language "in computing the *number and amount* of creditors," instead of using merely the word "number," since the distinction between "number" and "amount" is constantly kept in view in the prior clauses of the section. The same distinction is preserved in the language of Section 40, which provides that "if the court shall be satisfied that the requirement of Section 39, as to the *number and amount* of petitioning creditors, has been complied with," or if creditors "sufficient in *number and amount* shall sign such petition, so as to make a total of one-fourth in *number* and one-third in *amount* of the provable debts, as provided in said section, the court shall so adjudge."

Additional support is found for this view in the language of Section 41, with respect to the discontinuance of bankruptcy proceedings, which may be entered upon the assent, in writing, of the debtor, "and not less than one-half of his creditors in *number and amount*."

Section 43 also provides for a supersedeas of proceedings in bankruptcy by a resolution of three-fourths in *value* of the creditors, and further provides that "such resolution shall, to be operative, have been passed by a majority in *number* and three-fourths in *value*, and shall be confirmed by two-thirds in *number* and one-half in *value*, and in calculating the majority for the purposes of a composition, under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in *value* but not in the majority in *number*." By this clause Congress clearly indicated its intention that, in determining whether a composition should be effected by a majority in *value* of all the creditors, even the smallest in value must be reckoned, but only those whose debts exceed fifty dollars should be reckoned in determining the majority in *number*.

I do not see how the court can assume in this case that any of the creditors making up the sum of fourteen thousand

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three hundred dollars hold claims of less than two hundred and fifty dollars, but even if it could do so it would not change the result upon my view of the construction of this section.

Second. That it is not stated in said petition what is the nature of the debt set forth therein.

The allegation of the petition is that the demands "each exceed the amount of two hundred and fifty dollars, and the nature of your petitioner's demands are as follows: Accounts." Here follows the name of each creditor and the amounts.

No detailed statement of the petitioners' demand is necessary in a creditor's petition, but Form No. 54 seems to contemplate that it should be so far stated that the court may see that it is a provable debt. It was argued that the court had a right to look at the deposition in proof of the debt and to consider it as a part of the petition for that purpose. This court, however, held in the case of McKibben, 12 N. B. R., 97, 99, that the petition should be a complete pleading in itself, and should contain all the requisites necessary to make out a case, and that the depositions were intended to support the allegations in the petition, and not supply defects in them.

General Order 32 provides that the "several forms specified in the schedules * * * * shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case."

I think these forms should be followed wherever it is practicable to do so, and should be complied with as closely as the circumstances of the case will admit of. And this, I believe, has been the rule adopted in most of the districts. (See *Hunt v. Pooke*, 5 N. B. R., 161, 167).

Third. That the first act of bankruptcy charged is insufficient, in that it alleges only that the debtor, "being a merchant and trader, fraudulently stopped payment," without alleging that he stopped payment of his commercial paper.

The clause upon which this section is based, as originally enacted, read as follows: "Who being a banker, merchant, or trader, has fraudulently stopped or suspended, and not

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resumed payment of his commercial paper, within a period of fourteen days."

So many different interpretations were given to this section that in 1870 it was amended so as to read, "who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended, and not resumed payment of his commercial paper, within a period of fourteen days."

In the case of the Hercules Mutual Life Insurance Society, 6 N. B. R., 338, it was held by Judge Blatchford:

1. If the debtor were a banker, broker, merchant, trader, manufacturer, or miner, he might be put into bankruptcy for the fraudulent stoppage of the payment of his debts generally, whether such debts were commercial paper or not.

2. That the latter clause, "who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," applied to all persons whether of the classes enumerated or not.

I entertain very grave doubts whether this construction was correct, but whatever conflict of opinion may have existed with reference to the clause as it then stood, I think the last amendment to the section in 1874 has removed the difficulties. It now reads, "who being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended, and not resumed payment, within a period of forty days, of his commercial paper."

I think that Congress intended to provide by this that any person who has fraudulently stopped payment of his debts generally may be adjudicated a bankrupt. What would constitute a stoppage of payment is usually easy to determine. The closing of the doors of a banking-house, a general assignment for the benefit of creditors, or any other act which, in common parlance, is termed a failure, would be evidence of such stoppage; whether it would be fraudulent or not would depend upon the circumstances of each case.

I think this allegation sufficient.

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Fourth. That although the second act charges that the debtor, being a merchant and trader, fraudulently stopped payment of his commercial paper within a period of forty days, to wit, a certain draft, it does not appear that there was any fraud in the stoppage of payment, nor that the paper was actually the commercial paper of the said Hadley, and made by him in his character of merchant or trader, nor that it was ever presented for payment, and that payment was ever demanded.

The petition charges that "at Holly, in said district, on the 25th of March, 1875, the said Hadley, being a merchant and trader, has fraudulently stopped payment of his commercial paper within a period of forty days, to wit: a draft drawn by Watrous, Boyden & Co., for the amount of one hundred and thirty dollars, due and payable on or about the 25th of March, 1875, and duly accepted by the said Hadley, said draft still remaining unpaid."

I think this allegation sufficient. It is substantially a compliance with the forms. It is not necessary that the facts constituting the fraud should be set forth in the allegation of the act of bankruptcy, although it must appear in the deposition in proof of the act. So, the allegation that it was the commercial paper of Hadley, and made by him as a merchant, need not be averred except in general language, although these facts should be made to appear by deposition. The allegation of stoppage may be made in two forms: The pleader may set up a general stoppage of payment without describing any paper, or he may aver the stoppage of a particular piece of commercial paper, and rely upon it as *prima facie* evidence of a general stoppage. (*McLean v. Brown*, 4 N. B. R., 585; *In re Hercules Mutual Life Insurance Society*, 6 N. B. R., 338; *In re McNaughton*, 8 N. B. R., 44; *In re Wilson*, 8 N. B. R., 396.) In the latter case he must describe the paper sufficiently to identify it. *In re Randall & Sunderland*, 3 N. B. R., 18; s. c., *Deady*, 513.

Although this allegation does not give the date of the draft in question, still I think it sufficiently describes it to

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identify it, and is sufficient to prevent the party from being misled.

Fifth. That although the third act charged sets up a payment by way of preference, it is not stated or charged that such payment or preference was in fraud of the provisions of the Bankrupt Act or the amendments thereto.

I do not think that such allegation is necessary. The act does not provide in express terms for it, nor do the forms seem to contemplate the insertion of any such allegation. I think, however, the count is defective in not stating the name of the person who was intended to be preferred by the payment of the money in question. This the form contemplates, and I think good pleading requires.

Sixth. That the petition is not properly verified.

Objection is made that it is verified by an attorney of the petitioners instead of the petitioners themselves. The amendments of 1874 provide, however, that "if any of the said first five signers shall not reside in the district, the petition may be verified by the oath of the attorney or agent of the signers." But it does not appear in the verification that the first four signers, for whom the attorney signs the petition, are not residents of the district, and no authority appears for the signatures of the attorney. It is true that in the introductory portion of the petition the first four signers are described as of the cities of Rochester and Utica, in the State of New York, but I do not think that such description can be regarded as direct affirmation of the fact. The fifth signer is the firm of Hitchcock, Esselstyn & Co., of Detroit. The sixth signer is Isaac Sloman, of Rochester, and the seventh signer is the firm of Swartout, Ackerman & Co., of Syracuse, New York. The petition is verified by one of the firm of Hitchcock, Esselstyn & Co., in person, and by Mr. Edwards, who purports to sign for the first four petitioners, but I think the verification is fatally defective in failing to aver that they are non-residents of the district.

Further objection is made that the allegations in the petition are not supported by the depositions.

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The first deposition is that of William S. Edwards, who swears generally to the several acts of bankruptcy contained in the petition, but only upon information and belief. I think that a deposition in proof of an act of bankruptcy should be made upon the personal knowledge of the deponent. I would not say here that every fact contained in the deposition should be made upon personal knowledge; but if any fact whatever is stated upon information and belief it should be made with such particularity and detail that the court may see from whom the information was derived, the circumstances under which it is acquired, and the weight that should be attached to it. In the deposition in question, however, not only are all the facts stated upon information and belief, but they are stated in the most general terms, not specifying how, from whom, when and where the information was derived; and, in fact, it is substantially a rehearsal of the allegations in the petition. No weight whatever can be attached to it.

The other deposition is that of Cornelius J. Reilly, who swears that on the 21st of May he visited Holly for the purpose of investigating Hadley's affairs; that he saw and conversed with him; that in his conversation Hadley stated that about one month previously he had taken an inventory of his stock, which showed his assets to be about eleven thousand dollars, and his liabilities about thirteen thousand dollars; that that was his present condition, except that he had sold about one thousand dollars worth of goods. To deponent's question as to what had been done with the money realized from the sale of these goods, he replied that he had paid the Merchant's National Bank about five hundred or six hundred dollars, and that the President of the bank was a relative of his. There is nothing in this deposition to support any of the acts of bankruptcy charged, except possibly the preference to this bank. There is nothing to indicate a general stoppage of payment, or even the non-payment of the draft in question, much less that such non-payment was fraudulent in its character.

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Although I do not think it necessary that the petitioners should anticipate any defense in their depositions or make out anything more than a *prima facie* case, still there must be enough to justify the court in putting the party upon his trial.

There are, it is true, certain facts recited in the petition itself, following the several allegations of bankruptcy, but the form seems to require that such allegations should be contained in a separate deposition, and the practice has been uniform in that regard.

It follows from this that the order to show cause must be vacated, with which, of course, will follow the warrant of arrest and seizure.

The facts set forth in the petition as above stated were relied upon in part to justify the issuing of a provisional warrant. This court held in the case of McKibben, 12 N. B. R. 97, that the prayer for a warrant of arrest might be incorporated in the petition, and that, if sufficient grounds appeared in the depositions to justify the issuing of the warrant, it would not be quashed because a separate petition was not filed, although such separate petition was deemed the better practice. I have never known, however, of the facts relied upon in support of the warrant being incorporated in the petition, and do not approve of the practice. The facts stated in this petition are set forth with great looseness and generality, many if not most of them upon information and belief, and the petition is verified by one petitioner and by an agent of four others. Of course every fact stated in the petition of the parties' own knowledge must be held to be within the knowledge of each person verifying the petition. A case will very rarely arise where six or eight persons, or even two persons, will have personal knowledge of every fact set forth in a long statement of this kind, and to allow such statement to be made in this general way, and to be verified by several persons, is giving sanction to a looseness of practice which ought not to be tolerated. I think that in every case the facts in support of the warrant of arrest and of the order to show cause should be set forth in separate depositions, and, as above in-

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licated, I think the better practice is to file a separate petition for the warrant.

It results that the petition must be dismissed, and the order to show cause and the warrant of arrest be vacated.

SUPREME COURT.—MASSACHUSETTS.

A party who purchases a *chose in action* from the assignee cannot maintain an action thereon in his own name in a State court, where the laws of the State do not permit an assignee of a *chose in action* to sue in his own name.

NATHAN W. LEACH v. ALBERT C. GREENE.

CONTRACT for goods sold and delivered. The declaration also contained a count for conversion of the same goods. Trial in the Superior Court before Allen, J., who allowed a bill of exceptions, in substance as follows :

The plaintiff's counsel stated, in opening, that the original transactions with the defendant, out of which the suit grew, were with one William E. Brockway, of the city, county, and State of New York, who had sold the defendant beer, and had sent it in barrels to the defendant, which barrels, to the number of thirty-eight, had not been returned : that subsequently, on January 17, 1871, Brockway was adjudged a bankrupt in the United States District Court, for the Southern District of New York : that assignees were appointed and duly confirmed on February 13, 1871 : that the assignees sold certain choses in action, forming part of the bankrupt's estate, at public auction, on June 26, 1871, which sale was confirmed by the United States District Court aforesaid on May 1, 1872 : that Nathan W. Leach, the present plaintiff, was the purchaser of the bankrupt's choses in action, among which is the present claim for the barrels declared on in the plaintiff's writ.

The plaintiff offered in evidence the certified copy of the assignment in bankruptcy of the estate of Brockway,

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showing the appointment of John M. Guitlan and John Gordon, of the city of New York, as assignees of his estate, real and personal, including all the property of whatever kind of which he was possessed, or in which he was interested, or entitled to have on January 17, 1871, with all his deeds, books, and papers relating thereto, and bearing date February 13, 1871: also a certified copy of the bill of sale from the said assignees to the plaintiff, dated June 26, 1871, conveying to the plaintiff, for the consideration therein named, his heirs, administrators, and assigns forever, all the books, notes, books of account, and choses in action of the said Brockway, previously conveyed to the said assignees and uncollected by them; also a certified copy of the approval of the United States District Court of New York, in bankruptcy, bearing date May 1, 1872, of the sale at public auction by the assignees, on June 26, 1871, of certain choses in action, forming part of the estate of the said bankrupt. These several papers were admitted by the judge.

The plaintiff then called as a witness the said bankrupt, who testified that before his bankruptcy he had sold beer to the defendant, and sent it to him in barrels which were to be returned, and that he had made demand for these barrels of the defendant before his bankruptcy, in his own name, and since his bankruptcy and the sale of the choses in action sold by his assignees to the plaintiff, in the name of the plaintiff, before the present suit was brought; that he was authorized by the plaintiff to make this demand, and that the defendant said the State police had seized some of them, and that he would pick them up and send them back, but he never did so. These barrels constituted a part of the assets of the bankrupt's estate, and appeared in his book of accounts against the defendant. The plaintiff offered to prove, by letters of the defendant to Brockway, the promise to return the barrels before his bankruptcy. The number of barrels claimed as had by the defendant and not returned was thirty-eight, valued at four dollars and fifty cents each.

The judge ruled that the action upon these facts, if

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proved, could not be maintained in the name of the plaintiff, and the plaintiff alleged exceptions.

L. Lapham, for the plaintiff. The property in question consisted of barrels, not sold, but lent to the defendant, and to be returned by him to the original owner, Brockway, who was the owner of the barrels at the time of his bankruptcy. The assignment of the bankrupt passed and vested the title to these barrels to and in the assignees. They sold the same by order of court, and the sale was approved by the court. The title thereupon passed by operation of law, and they became the property of the plaintiff. He made a demand upon the defendant for his own property, after its purchase, and before the present suit was brought, and the defendant promised to pick them up and send them back. He never did. Had they been stolen they might have been described as the property of the plaintiff in an indictment against the thief. When a man becomes the owner of property by operation of law, he can maintain an action for it in his own name, after demand upon the person who withholds it from him illegally.

J. C. Blaisdel, for the defendant.

ENDICOTT, J.—It is distinctly stated in the bill of exceptions that the plaintiff purchased certain choses in action belonging to a bankrupt's estate at public auction, among which was the claim for the barrels, declared on in the writ. It was not, therefore, a sale of the barrels, as now contended by the plaintiff, but of a chose in action.

It has been uniformly held in this Commonwealth that the assignee of a chose in action cannot, in the absence of a promise to himself, maintain an action thereon in his own name, but may do so in the name of his assignor. *Usher v. D' Wolfe*, 13 Mass., 290 ; *Foss v. Nutting*, 80 Mass., 484. The same rule has been held to apply to a sale by an official assignee of a chose in action belonging to the estate of an insolvent debtor, and that, under the provisions of the insolvent law then in force, no right of action vested in the vendee of the assignee. *Hay v. Green*, 66 Mass., 282.

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By the Statute of 1859, C. 194, Section 1 (Gen. Sts., C. 118, Section 100), it was expressly provided that any suit brought on a claim or demand sold by the assignee of an insolvent debtor, shall be brought in the name of the purchaser, and that the fact of such sale should be set forth in the writ. See *Cushman v. Davis*, 85 Mass., 99.

An assignee under the Bankrupt Law of the United States, Statutes of 1867, C. 176, Section 14, has the same power to deal with and dispose of choses in action vested in him, as the bankrupt might have had, if no assignment had been made. No special authority is given to the purchaser from such assignee to maintain a suit thereon in his own name.

There is no reason, therefore, for taking the case out of the settled rule in this Commonwealth. The *lex fori* must govern, and the ruling below is affirmed.

Exceptions overruled.

UNITED STATES CIRCUIT COURT—E. D. NEW YORK.

The assignee cannot impeach the validity of a mortgage which is void as against creditors on account of the omission to record it as required by the State laws. 6 A. R. 58

In re CHARLES COLLINS.

HUNT, J.—The case is presented upon the facts appearing in the following petition, viz. :

To the U. S. District Court of the Eastern District of New York :

The petition of Carston Schomaker respectfully shows that on or about the —— day of May, 1873, he sold and delivered to Charles Collins three locomotive tubular boilers for the price of one thousand five hundred dollars.

That on the 29th day of October, 1873, said Collins gave to him a chattel mortgage on said boilers for one thousand four hundred and forty-eight dollars and forty cents, a part of

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the purchase-money of said boilers, which had not been paid.

That said chattel mortgage was not filed for record until June 5, 1874, and that said mortgage has not been paid, but said mortgagor was at the times herein referred to and now is indebted for the whole amount secured thereby to this petitioner.

That on the 22d day of April, 1874, a petition to have said Collins adjudged a bankrupt, was filed in this court, and proceedings commenced by the service of a citation or order, to show cause why he should not be so adjudged, as your petitioner is informed and believes.

That on the 11th day of June, 1874, said Collins was adjudged a bankrupt, and on the 26th day of June, 1874, Robert King was elected and appointed assignee, as your petitioner is informed and believes.

That said boilers have come into the possession of said assignee as the property of said bankrupt. That said chattel mortgage is payable on demand, and that your petitioner has demanded payment of said Collins and said assignee, and said mortgagor is in default on said mortgage.

That said mortgage was taken by the petitioner in good faith, without fraud, and in the full belief that said Collins was abundantly solvent.

That the petitioner has demanded said boilers of said assignee, and on petition of said assignee a sale thereof has been ordered under Section 25 of the Bankrupt Act.

Wherefore your petitioner prays that said mortgage shall be declared a lien on the property therein mentioned, and that the amount thereby secured shall be allowed and paid to the petitioner by the assignee of Charles Collins, the bankrupt therein, and that if upon the sale of said property, by order of this court or otherwise, by said assignee, this petitioner shall be the highest bidder, that said assignee shall allow and apply upon said bill the amount so secured by said mortgage to this petitioner, and such other and further relief granted as shall be just.

C. SCHOMAKER.

Tracy, Catlin & Brodhead, solicitors for petitioner.

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UNITED STATES OF AMERICA, EASTERN DISTRICT OF NEW YORK, ss :—C. Schomaker, being duly sworn, does say that he is the petitioner whose name is subscribed to the foregoing petition ; that said petition is true to deponent's own knowledge, except as to the matters therein stated on information and belief, that as to those matters he believes it to be true.

[L. S.]

JOHN P. HUDSON, Notary Public,
Kings County.

The debt of Warner & Company, the creditors on whose behalf the appeal is taken, was contested while the boilers were in the hands of Collins and after the mortgage was given and before it was filed. It does not appear that judgment has been recovered upon their debt.

The order was granted by the Judge of the Eastern District, as asked for, and from this order the present appeal is taken.

The argument of the appellant is this : That by the Statutes of New York (3 R. S., 5th Ed., 222, Sec. 9) a chattel mortgage not accompanied by an immediate delivery and change of possession of the thing mortgaged "shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed" as directed in a section following : that the assignee represents the creditors of the bankrupt as well as the bankrupt, and by the Statutes of New York (3 R. S., 5th Ed., 226, Sec. 1) as well as by the principles of the Bankrupt Act, may attack and set aside any mortgage or assignment that could be attacked by a creditor, if bankruptcy had not occurred.

The appellant cites *Thompson v. Van Vecten*, 27 N. Y., 568, 581, and 2, and *Parshall v. Eggert*, 54 *Ib.*, 18, to show that the mortgage is void as against a debt contracted before it was filed, although judgment was not obtained upon the debt until after such filing ; that while it is conceded that the mortgage cannot be attacked until the creditor's debt is put in judgment and an execution issued thereon ; that when these

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requisites are met, the debtor may go back to the origin of the debt, and if the mortgage was then unfiled it is deemed to be fraudulent as against the judgment and execution thus subsequently obtained.

This course of reasoning is entitled to great consideration. In the present case the essential fact of a judgment and execution in favor of the appealing creditor is not set forth. There is no evidence or reason to suppose that up to this moment they are in a condition to attack the mortgage, if no proceedings in bankruptcy had been taken.

I think the position is a sound one, that the assignee represents the creditors, and that he is authorized and bound to protect their interest. In the instance of a fraudulent conveyance, where, by his participation in the fraud, the debtor has lost the right to attack the conveyance, I do not doubt the power of the assignee, as representing creditors, to attack it, wherever creditors could do so.

The difficulty here is that the creditor has no such right. Has the assignee any other or greater rights than the creditor?

The New York Statutes declare the mortgage, unless filed, to be void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith. The creditors spoken of have been shown to be those having judgments and executions. Subsequent purchasers or mortgagees in good faith are those who pay or advance their money upon the security of the property without knowledge of the previous incumbrances. (*Thompson v. Van Vechten*, 40 N. Y., 586; *Van Heusen v. Radcliff*, 17 *Ib.*, 580.)

The assignee cannot claim to hold either of these positions.

So far as it is obtained from State laws, the assignee would seem to have no power to attack the mortgage. He does not represent a judgment and execution, or a purchaser or mortgagee in good faith.

Does the Bankrupt Act of the United States give to the assignee, under the circumstances stated, the authority to set aside this mortgage as fraudulent?

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Section 14 enacts that "all the property conveyed by the bankrupt in fraud of his creditors, all rights in equity, etc., * * * shall, in virtue of the adjudication of bankruptcy, and the appointment of his assignee, be at once vested in such assignee."

It is also enacted in the same section "that such assignments shall relate back to the commencement of said proceeding in bankruptcy, and thereupon, by operation of law, shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached."

All rights at law or in equity to this property, possessed by the bankrupt when the bankrupt proceedings were commenced, belong to the assignee.

The case of *Allen v. Massey*, 7 N. B. R., 401; s. c., 17 Wall., 351, is cited to show that the assignee has power to maintain this action. It does not appear from the report of the case that the law of Missouri makes it necessary that there should be a judgment and execution before a creditor can attack a fraudulent mortgage, nor that that point was presented in that case.

If the creditor had, or has a right in law or in equity, it passes to the assignee. If he has none, nothing passes to the assignee.

I do not perceive how the transfer from the bankrupt to the assignee relieves from the necessity of obtaining that specific lien upon the property, which is needed to authorize an attack upon the mortgage. The New York Reports are full of cases to the effect that a simple debt or a judgment even will not justify a bill to set aside as fraudulent a conveyance of real estate. The creditor must first have a deed or mortgage from the debtor, a Sheriff's certificate of sale on execution, or some equivalent right giving a claim upon the specific property conveyed. (*Frost v. Mott*, 34 N. Y., 253; *Cramer v. Blood*, 57 Barb., 155; *Dunlevy v. Talmadge*, 32 N. Y., 457.)

So in the case of a fraudulent incumbrance upon personal property, a general debt will not authorize a proceeding to

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vacate it. There must be a bill of sale, or mortgage, or execution, or an attachment, levy, or its equivalent, constituting a lien upon the specific chattel.

The cases are all based upon the theory that the party attacking the fraudulent act must have an interest in or a lien upon the specific property thus incumbered. This is an indispensable requisite.

The assignee gains no additional rights over those possessed by the bankrupt, by a conveyance from him, or by his authority. The bankrupt can transfer no lien upon this specific property, because he possessed none. The creditors can give to the assignee no such lien for the same reason. (*Esbras v. Warden*, 14 Wall., 248.)

As against the debtor himself, the mortgage was and is a good debt and a valid lien. (*Hull v. Sweet*, 40 N. Y., 99; 23 Wend., 653; 4 Duer, 107.)

It is fraudulent as against the parties particularly named, viz. : purchasers or mortgagees in good faith, or creditors who shall have obtained some specific lien upon the chattel mortgaged.

The non-existence of a judgment of execution in favor of Warner & Co., is a radical defect. It is not in the nature of a technical or formal objection, but one going to the essential merits of the case.

The order appealed from must be affirmed.

WARD HUNT, Judge.

In re Bergeron.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

An attaching creditor may move to set aside an adjudication of bankruptcy, though no party to the bankruptcy proceedings.

Though the aggregate of the debts of the petitioners whose debts exceed two hundred and fifty dollars in amount, does not equal one-third of the aggregate of all debts exceeding two hundred and fifty dollars, still the petition should be sustained, if the aggregate of all the petitioners' debts equal one-third of the aggregate of all the debts provable against the estate.

In re JOHN B. BERGERON.

In re John B. Bergeron; upon the petition of Doggett, Bassett & Hills, of Chicago, to set aside adjudication in bankruptcy.

The petition sets forth that petitioners were creditors of Bergeron upon an open account for merchandise to the amount of fourteen hundred and twenty dollars and forty-six cents. That on the 28th of January, 1875, they commenced suit against the bankrupt in the Circuit Court for the county of Calhoun, by attachment, and that the suit is still pending; that on the 31st day of March certain creditors of the bankrupt filed a petition upon which Bergeron was adjudicated a bankrupt by default. They further allege that the proceeding was not taken by creditors who constituted one-fourth in number of the creditors of the said Bergeron, nor was the aggregate of their debts one-third of the debts provable against him under the Bankrupt Act. They further set forth that only two petitioners whose debts exceed two hundred and fifty dollars were parties to the petition, and that their debts in the aggregate did not equal one-third of the entire amount of debts which exceeded the sum of two hundred and fifty dollars. They further allege that they have acquired rights by virtue of their attachment in the State court, which will be destroyed by the bankruptcy proceedings, and pray that the order of adjudication may be set aside, for the reason that a sufficiency of creditors did not join in the petition.

Mr. Romeyn, for the petitioners.

C. I. Walker, for the assignees.

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BROWN, J.—Upon the argument of this case I intimated a doubt whether a creditor who had obtained a preference by attachment, and was no party to the bankruptcy proceedings, stood in a position to set aside an adjudication, even though it had been improperly and irregularly entered.

The first reported case I have found is that of *Brewster v. Shelton et al.*, 24 Conn., 140. Under the laws of that State, an attachment-creditor filed a petition in the Probate Court for the appointment of a trustee of the debtor, pursuant to the provisions of the statute, and it was held that other attaching creditors were so far interested in the subject-matter before the court, that they had a right to be heard in opposition to the proceedings. The effect of the application being to dissolve their liens acquired by the attachment, the court held they were entitled to appear and protect such liens, and to show that the proceedings were commenced and carried on with a fraudulent design, to injure them and the other creditors of the insolvent.

The question first arose under the new Bankrupt Law in the case of *Walker*, 1 N. B. R., 386, where the District Court of Massachusetts entertained a petition to vacate an adjudication upon a voluntary petition for want of jurisdiction, averring that the bankrupt had not resided in the district, as required by law. No objection, however, was made to this mode of review.

The question was first distinctly presented in the case of *Fogerty and Gerrity*, 4 N. B. R., 451, where it was held that as all creditors are parties to, and bound by the proceedings in bankruptcy, an adjudication which was not made and carried on within the proper jurisdiction, should be set aside and vacated upon the petition of an attaching creditor. In such a case, however, I apprehend that the adjudication would be void, even in a collateral proceeding. Objection being taken that the creditor had no right to institute these proceedings, it was held that consent could not confer jurisdiction, and that he might attack it directly, as well as take advantage of it collaterally.

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In the case of *Karr v. Whittaker*, 5 N. B. R., 123, the court held that there was no party to a creditors' petition except the petitioning creditors and the bankrupt; that a party to whom the bankrupt had made a fraudulent preference, and who had been enjoined from disposing of the property of the bankrupt, had no right to contest or to vacate the adjudication, that being a matter in which he could have no interest. It was claimed in this case, that the adjudication had been procured fraudulently, that there had been no publication, and that before adjudication the bankrupt had died.

A similar view of the law was taken by the District Court of Southern New York in the case of the Boston, Hartford and Erie Railroad Company, 5 N. B. R., 232, in which a creditor who had filed a petition in another district asked leave to defend against another petition filed in the Southern District of New York. The court held that he had no concern in the matter before adjudication. On appeal to the Circuit Court, however, Judge Woodruff reversed this ruling and entertained the petition; 6 N. B. R., 209. The recognized ability and learning of Judge Woodruff entitles this opinion to great weight. It was subsequently followed by Judge Blatchford, in the case of *Derby*, 8 N. B. R., 106, and is recognized as the law of that circuit. In this case, an infant had been adjudicated a bankrupt, and the court granted the petition of the mortgagee to set aside the adjudication upon that ground.

A different view was taken of the law by the late Judge Hall, of the Northern District of New York, in the case of *Bush*, 6 N. B. R., 179—quoting and following the opinion of Judge Blatchford in the case which was subsequently reversed by the Circuit Court.

It will thus be seen that the weight of authority is decidedly in favor of entertaining jurisdiction of such petitions, and upon mature reflection I am satisfied that it is founded upon the better reason. Although the proceedings between the petitioning creditors and the bankrupt until the adjudication are in a measure *interpartes*, still, as such adjudica-

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tion operates *ipso facto*, to dissolve all attachments issued within four months before the commencement of the proceedings, I think that an attaching creditor is entitled to interpose and protect his interest. It would be a singular anomaly if a lien, obtained by his diligence, could be set aside by proceedings to which he could not make himself a party. Although the finding of the court as to the sufficiency of creditors in number and amount would be binding in any collateral proceeding, still it is a *quasi* jurisdictional allegation, and if the attention of the court is called to the want of a proper number of petitioners, I think the adjudication should be opened.

Upon the facts of this case, however, disclosed in the petition, I am satisfied the adjudication should not be set aside. The act requires that proceedings shall be instituted by creditors who shall constitute one-fourth in number, and the aggregate of whose debts, provable under the act, amounts to at least one-third of the debts so provable. The same section further provides that in computing the *number* of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. It has already been held by this court, in the case of Hadley, 12 N. B. R., 366, contrary to the view taken by the District Court for the Southern District of New York, *In re Hymes*, 10 N. B. R., 433, that in computing, the amount of creditors who should join, is contradistinguished from the *number*, creditors whose claims are less than two hundred and fifty dollars, should be reckoned. It appears by the petition in this case that there are five creditors whose debts exceed two hundred and fifty dollars, two of whom have joined in this petition. So far as the *number* is concerned, then, there is no doubt of their sufficiency.

The aggregate of the bankrupt's debt as disclosed by the petition of Doggett, Bassett & Hills, is four thousand eight hundred and ten dollars and twenty-six cents.

The aggregate of the debts of the petitioning creditors is

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sixteen hundred and seventy-one dollars and ninety-seven cents, three times which would be five thousand and fifteen dollars and ninety-one cents. More than one-third of the aggregate of the bankrupt's debts are therefore represented in the creditors' petition, although the debts of three petitioning creditors are each less than two hundred and fifty dollars in amount.

The petition must therefore be denied.

UNITED STATES DISTRICT COURT—INDIANA.

In a proof of debt, the creditor should set forth at least one full Christian name of the affiant and of the bankrupt as well as the surname.

In re WILLIAM H. VALENTINE.

Eben W. Kimball, for creditor.

MCDONALD, J.—One A. G. Wallace, before Register Ray, offered proof and prayed allowance of a claim on the estate of the bankrupt. The claim consisted of a note of five hundred dollars, alleged to have been executed by the bankrupt to Wallace. The note, on its face, purports to have been made by W. H. Valentine to A. G. Valentine, using the initials of the Christian names only. In this form the note was shown in evidence to the Register. There was no allegation on paper, and no evidence offered as to the full Christian names of either of the parties to the note. And for the want of this, the Register refused to allow the claim. To this Wallace excepted; and the case comes before me on the Register's certificate touching this ruling.

It is a primary rule, subject to few exceptions, that in judicial proceedings, whenever it is necessary to refer to persons, the Christian names of such persons must be stated in full. Where, however, the person has two Christian names, it is enough to state the first in full. This rule is particularly applicable to the names of parties to actions. The

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reason of the rule is, that all persons with whom courts are concerned in litigation ought to be identified; and a statement of their full Christian and surnames is the most satisfactory method of identifying them.

In this State, even in a Justice's court, it is not sufficient to state merely the initials of the Christian names of the parties.

If the present case had been an action of assumpsit by the payee against the maker of the note in question, no lawyer would doubt that the full Christian names of both parties should be stated in the pleading. The same reason for requiring this in that case, applies equally to the present proceeding. So far as concerns parties to legal proceedings, whether they be adverse or *ex parte* proceedings, I think the reason of the rule is equally applicable. And I know no case in which any person applying to any court of record for any kind of relief or redress, is not bound to give at least one full Christian name as well as his surname. Indeed, the ancient common law deemed it more important that the full Christian name should be stated than the full surname.

The decision of the Register is approved.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A retail dealer in groceries who keeps no invoice-book, but keeps all his invoice-bills carefully together, so that a complete account of all goods received by him can be made out from them [the other customary books being also kept], keeps proper books of account. The question of book-keeping is a question of fact in each case.

In re J. K. P. REED.

J. L. Nichols and *George W. Searle*, for objecting creditors.
L. B. Thompson and *E. T. Luce*, for bankrupt.

LOWELL, J.—I do not find that the objecting creditors have made out that the bankrupt concealed money from the assignee. There are many cases in which it is somewhat

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difficult to understand what has become of the property the bankrupt has had, or has represented himself to have, not long before the bankruptcy. In some instances the suspicious circumstances may be so strong as to authorize the court to find a concealment of money, or property had been recently turned into money. But such a case is not made out here. With regard to books of account, the objection is that the defendant kept no invoice-book. The business was that of a wholesale dealer in liquors, and a retail dealer in groceries, the former being the larger. In that business, he was obliged by a law of the United States to keep, and did keep, an invoice-book; in his retail grocery business he kept none; but he testifies that he kept all his invoices carefully together, and that a complete account of all goods received by him can be made out from those files. It was in evidence that retail grocers do not usually keep an invoice-book. The question of book-keeping is a question of fact in each case, and depending somewhat upon the nature and account of the business, and other circumstances. There are tradesmen who could hardly be expected to keep any items of their business; for instance, peddlers, and retail sellers of liquor by the glass, etc. Upon the whole, I think the objection is not made out.

Discharge granted.

UNITED STATES DISTRICT COURT—INDIANA.

If a bankrupt partner was a member of two firms, the assets of the bankrupt firm should be applied to pay the firm debts, and any surplus of the individual assets that may remain after paying the individual debts in full, should be distributed *pro rata*, among the creditors of both firms.

In re ROBERT K. DUNKERSON & CO.

Asa Iglehart, for Evansville National Bank.

A. G. Robinson, for assignee.

MCDONALD, J.—This case comes before me on a certificate

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of Charles H. Butterfield, Esq., Register for the Evansville District. His certificate is as follows :

“ This question arises upon the distribution of the assets in said matter, and embraces two classes of liabilities. One class embraces paper upon which the firm of R. K. Dunkerson & Co. is liable ; and the other embraces paper upon which R. K. Dunkerson is liable, not individually, but as a member of the firm of Brown & Dunkerson, which last mentioned firm was dissolved some years before the bankruptcy.

“ The Evansville National Bank has proved in this case the following described notes, to wit : One promissory note drawn by Thomas E. Johns, Archie Baugh, and Joe C. Jones, and indorsed by Given, Watts & Co., and Brown & Dunkerson—amount five thousand and six dollars and thirty cents. Also three other notes, each for the sum of five thousand dollars, drawn respectively by E. Warfield, Watt F. Johnson, and J. D. Vance, and each indorsed by Given, Watts & Co., and by Brown & Dunkerson—said last-mentioned firm being composed, at the time of said indorsements, of William Brown and Robert K. Dunkerson, one of the petitioners in this matter. Upon these notes, R. K. Dunkerson is the only member of the firm of R. K. Dunkerson & Co. who is liable—his liability arising out of his connection with the firm of Brown & Dunkerson.

“ In the distribution of the assets belonging to the firm of R. K. Dunkerson & Co., and the assets belonging to the individual members of said firm, the assignee insists that the dividend shall be made in the following manner, to wit : 1. The individual debts of R. K. Dunkerson shall be paid in full out of his individual assets. 2. The assets belonging to the firm of R. K. Dunkerson & Co. shall be distributed, *pro rata*, among all the creditors of R. K. Dunkerson & Co. who have proved their debts. 3. The individual assets of R. K. Dunkerson, remaining after paying his individual debts in full, shall be distributed, *pro rata*, among all the creditors proving their claims, to whom R. K. Dunkerson was liable at the time of filing his petition in bankruptcy, either as a member of the

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firm of R. K. Dunkerson & Co., or of the firm of Brown & Dunkerson.

"To this the Evansville National Bank objects, and insists that, after paying Dunkerson's individual debts, the surplus of his individual assets shall be merged in the assets of the firm of R. K. Dunkerson & Co.; and that said bank shall be allowed a dividend upon the amount of the notes above described out of the assets of the firm of R. K. Dunkerson & Co., after the individual assets of Dunkerson, left after paying his individual debt, shall have merged as aforesaid, the same as upon the amount due said bank from the firm of R. K. Dunkerson & Co."

That when a debtor is jointly liable as a partner, and separately liable as an individual, partnership property must first go to the payment of the partnership debts, and his individual property to the payment of his individual debts, is too well settled to admit argument or to require the citation of authority. In the present case, it seems that the separate property of Dunkerson far exceeds his separate liabilities; and that the partnership property of the bankrupts, Dunkerson & Co., is far less than their partnership liabilities. It follows, therefore, that all the individual debts of Dunkerson must be fully paid out of his individual property; and that all the partnership assets of Dunkerson & Co. must be applied, so far as they will go, to pay the partnership debts. This conclusion, I think, nobody will dispute. And, if in this I am correct, the only point to be decided is, whether the said claim of the Evansville National Bank is a debt due by the partnership firm of Dunkerson & Co. This it clearly is not. It is true that the debt due to the bank is a partnership debt; but it is due by the old firm of Brown & Dunkerson. This firm does not appear to have been declared a bankrupt. If it had, no doubt this debt due the bank ought to be paid *pro rata* out of the assets of that firm. But, so far as the firm of Dunkerson & Co. is concerned, the claim of the bank, beyond all doubt, is not a partnership debt, and is not entitled to any dividend out of the assets of that firm.

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The mode of distribution insisted on by the national bank would, therefore, be plainly improper and unjust.

I fully agree with the Register, in his conclusion, that the individual debts of R. K. Dunkerson must first be paid in full out of his individual assets; that the assets of the bankrupts, Dunkerson & Co., shall be distributed, *pro rata*, among all their creditors who have proved their debts; and that the individual assets of R. K. Dunkerson, after first satisfying in full his individual debts, shall be distributed, *pro rata*, among all the creditors who have proved their claims in this case, and to whom R. K. Dunkerson was, at the time of the filing of the petition in this case, liable either as a member of the firm of Dunkerson & Co., or of any other firm. And I direct that the Register make the distribution accordingly. And I further order and adjudge, that the Evansville National Bank pay the costs of this proceeding.

UNITED STATES DISTRICT COURT—MISSOURI.

Creditors of a bankrupt holding an order obtained before bankruptcy, on a general fund, acceptance thereof having been refused, though holding an equitable assignment of the fund *pro tanto*, will be restrained from prosecuting their suit, after bankruptcy, against the managers of the fund, in the State court.

The bankrupt himself, before bankruptcy, or his assignee after bankruptcy, is a necessary party to a suit in equity on such an order, and the Bankruptcy Court has exclusive jurisdiction for the determination of all questions pertaining to the bankrupt's estate.

WILLIAM R. WALKER, Assignee of MAURICE H. FITZGIBBON v. SEIGEL & BOBB et al.

TREAT, J.—The bill prays for an injunction to prevent the prosecution of a suit by Seigel & Bobb, in the Buchanan Circuit Court, and against the other defendants.

The managers of a State lunatic asylum, in their capacity as such State officers, had in their possession a large sum of money applicable to the payment of debts due Fitzgibbon, the bankrupt. The latter, before bankruptcy, gave an order

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on said managers to pay ten thousand dollars to Seigel & Bobb, to whom Fitzgibbon was indebted for work and materials furnished. The order was duly presented and acceptance and payment refused. The managers had full notice thereby of the existence of said order.

An examination of the authorities shows that at the present time the general rules governing such cases are :

First. That a draft or check does not operate as an assignment of the funds unless accepted,—so that the holder can sue the drawee in his own name. There is no privity between the holder and drawee, and this obtains whether the funds are general against which the draft is made, or the fund is specific.

Second. An order drawn for the whole of a particular fund, is an equitable assignment of the fund, and after notice to the drawee binds the funds in his hands. In such a case it seems that a suit in assumpsit may be maintained in the name of the assignor to the use of the assignee.

Third. An order drawn on a general or particular fund for a part only, does not amount to an assignment of that part, or give a lien as against the drawee, unless he accepts. That rule, as thus broadly stated, seems to apply only to cases at law. Such an order, so soon as notice is given to the drawee, works an assignment in equity. In a few States, from the peculiar character of their practice, a direct action could be had by the assignee in his own name, or in the name of the drawer, to the use of the holder. The general doctrine, however, is as stated in 37 Mass., 15 (*Gibson v. Cooke*), and 14 Wallace, 69 (*Christmas v. Russell*). The holder is driven to his suit in equity, where the interests of all concerned in the fund can be disposed of at the same time. The rule in *Mandeville v. Welch*, 5 Wheaton, 277, has never been departed from in United States courts ; but that rule, and the reasons on which it rests, pertain solely to actions at law.

In equity, partial assignments of the fund are recognized, because the drawee is subjected to only one suit. True, in some States a suit in the name of the assignor for the use of

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one or more assignees has been upheld, on the theory that the assignor may recover from the drawee all funds of the assignor in the latter's hands, and while the equitable interest of the assignee or assignees will be thus protected, the drawee will be subjected to only one suit.

But it is apprehended that such rulings are wholly inconsistent with the doctrine that, in United States courts, pure equity proceedings cannot be, and are not, modified by State modes of practice. If the rights of a party are cognizable alone in equity, he must proceed accordingly.

In law courts, as actions of assumpsit proceed on an express or implied promise or undertaking by the defendant in favor of the plaintiff, that privity must exist. In the absence of such promise or undertaking, where notice of the order is given, many State courts have held that suits in the name of the assignor to the use of the assignee, may be maintained at law, whether the order was for the whole or part of a fund in the hands of a drawee.

This court sitting under a different system as to equity causes, must compel persons who have no assignments or liens, except in equity, to pursue their remedies solely in equity.

But it is contended that as Seigel & Bobb had an assignment in equity of this fund *pro tanto*, they had a right to sue therefor in their own names in the State court, where by force of the State statutes they could proceed accordingly, there being no distinctions in form as to legal and equitable proceedings. If their right so to do were irrespective of any supervision or jurisdiction of a United States Court, the proposition might be correct.

In this case, as presented, it appears that Fitzgibbon was adjudicated bankrupt; that thereafter Seigel & Bobb proved a demand against the bankrupt's estate for thirteen thousand dollars, ten thousand dollars of which was secured (as above set out) and the other three thousand dollars unsecured.

Thereupon, without leave had from this court sitting in bankruptcy, and without making the assignee in bankruptcy

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a party, they instituted in a State court, according to the mixed State practice, an action as assignees in equity for the sum of ten thousand dollars against the other defendants (the drawees), said sum being part of the fund in the hands of the latter.

If the foregoing rules are correct, then the bankrupt in person, who was the assignor, or his assignee, would in equity be a necessary party, and the managers would have a right to cause the other claimants of the fund, if any, to interplead. But it is urged that after the order drawn and notice to the drawees, Fitzgibbon was in equity only a trustee for the payees, and therefore his interest did not pass to his assignee in bankruptcy. It is certainly correct that property held merely in trust by the bankrupt does not pass to his assignee; but it is also true that if he has an interest, or if his trust is coupled with an interest, then his assignee in bankruptcy is vested with said interest.

Here, however, we have by the Bankrupt Act exclusive jurisdiction for the determination of all such questions when they arise, vested in the court which has charge of the bankrupt's estate. If a person holding a mortgage, or deed of trust, or collaterals of any kind, to secure an alleged debt, can, regardless of the court in bankruptcy, proceed to dispose of the same, without question, and without the knowledge or consent of said court, or without having the validity of his debt, or of the security, passed upon by said court, then there will be no practical force given to the many important provisions of the Act of Congress, designed to vest in the United States Court exclusive jurisdiction of all such questions.

This court rules, therefore, that the plaintiff is entitled to the injunction prayed for, and that the prayer of the managers for the other claimants of the fund in their hands to be cited in to interplead ought to be granted. They are entitled to be thus protected.

The orders will be accordingly.

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UNITED STATES DISTRICT COURT—N. D. MISSISSIPPI.

The phrase of 35th Section: "In fraud of the provisions of this act," construed.

If a mortgagor conveys in fraud of the Bankrupt Law, actual notice must be brought home to the mortgagee who has taken conveyance under circumstances promising material relief and assistance to the debtor, and apparently for that purpose.

The new rule controls cases in which conveyance was made before the passage of the amendatory act, provided there was no judicial passage on the conveyance previous to the amendment.

J. B. BOOTHE, Assignee, etc., v. BROOKS, NEELY & CO.

HILL, J.—This cause is submitted upon bill, answer, exhibits, and proof. The purpose of the bill is to have set aside and declared void a deed of trust executed by said Hightower & Butler, bankrupts, on the 31st day of January, 1874, by which certain real estate described in the bill belonging to said Hightower individually, and certain other real estate belonging to the firm of Hightower & Butler, was conveyed in trust to secure the payment of the indebtedness then due from them to the defendants of three thousand six hundred and eighty-eight dollars and fifty-two cents, being a balance due from the mercantile transactions between the parties for a number of years.

The bill alleges that said Hightower & Butler were, at the time of this conveyance, insolvent, and that said conveyance was made with the intention to give to defendants a preference over their other creditors, and to defeat the object of the Bankrupt Law, and in fraud thereof; that at the same time defendants had cause to believe, and knew of the insolvency of Hightower & Butler, and of the intention and purpose of said conveyance as stated, and accepted the same in fraud of the provisions of the Bankrupt Law; which defendants, by their answer, deny.

The proof shows that at that time Hightower & Butler were commercially insolvent, if not legally so, and also shows that defendants then had knowledge of such facts as consti-

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tute such commercial insolvency, that is, that they were unable to meet their commercial obligations as they fell due in the usual course of business. Few, even among commercial men, draw the distinction between commercial and legal insolvency, and I take it for granted that defendants do not make this distinction.

The main question to be determined is, did defendants at the time the conveyance was made for their benefit, have cause to believe that Hightower & Butler were insolvent, and did they then know it was in fraud of the provisions of the Bankrupt Act? If they did, then the conveyance must be declared void under the provisions of the 35th Section of the act, but if these two facts did not then exist, the conveyance must be upheld. The existence of the first fact I am satisfied did exist. The second fact necessary to exist to avoid the deed being denied by the answer, throws the burthen of proof for its establishment upon the complainant.

The meaning of the words, "In fraud of the provisions of this act," is anything which will give a preference to one creditor over another (except those who at the time have an existing lien or priority), and which will prevent an equal distribution of, and participation in, the assets of the bankrupts among their general creditors.

The proof shows that the property conveyed was encumbered by prior conveyances, amounting to some eight thousand to ten thousand dollars, which was then known to defendants, which was the principal indebtedness then known to defendants other than that due them. The proof further shows that when the negotiations for this security was being had, that Hightower stated to J. C. Neely, one of the defendants, that the firm owed about ten thousand dollars, and owned assets worth fifty thousand dollars. Hall, the attorney who drew the trust deed, states in his testimony that Hightower then stated to him that he had plenty to pay all his debts, or twice enough for that purpose. The trust only conveyed the real estate of the firm, leaving the

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stock of goods then on hands, together with the debts due them, amounting nominally to a large sum, which was unencumbered, from anything appearing in the evidence. Time was extended on the indebtedness due defendants, on one thousand dollars, to April 1st; on thirteen hundred and forty-four dollars and twenty-six cents, to November 1st, 1874, and on thirteen hundred and forty-four dollars and twenty-six cents, to January 1st, 1875. It was further promised by defendants that they would make further advances to Hightower & Butler to enable them to carry on their business, thus postponing the time of payment on much the larger amount until the cotton crop would come in, from which it was reasonable to presume a considerable amount might be realized from the indebtedness due Hightower & Butler. It often happens among commercial men, that an extension of time for payment enables them to realize from their means, whether stock in trade or debts due them, by which they are enabled to escape bankruptcy and ruin, and when made in good faith for that purpose, and not with the intention to obtain a preference over other creditors, or to prevent the debtor's estate from being distributed under the Bankrupt Law, and especially where the party for whose benefit the conveyance is made has reason to believe, and does believe, that the debtor has sufficient means to discharge his other debts,—I am of opinion a conveyance made to secure such extended indebtedness so made, and free from any fraud or intention to obtain a preference over other creditors, or to defeat the purpose and object of the Bankrupt Law, is not obnoxious to its provisions as amended by the Act of June 22d, 1874, which was evidently intended as a modification of the law in relation to conveyances before that time, held void under the law then in force. This was done to relieve the honest debtor who was striving to extricate himself from his embarrassments and meet his liabilities, and was no doubt induced from the large number of this class, who, although owning assets nominally greatly in excess of their liabilities, could not, owing to the financial crisis of

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1873, realize them. This amendment, however, does not change the law where the intention is to obtain a preference over other creditors, and thus defeat the object and purpose of the Bankrupt Law, that is, equality among the creditors of the debtor's estate.

But it is insisted that this amendment does not embrace or apply to this conveyance, as it was made before that enactment.

The first case decided by me under this amendment, was a motion made by defendant's counsel to set aside the adjudication of bankruptcy of these bankrupts, on the ground of the retroactive operation provided in this amendment. I then decided that as the decree of bankruptcy had been made, and rights vested under it, that the Congress had no power to disturb the decree, but in all cases where rights had not been fixed by the decrees of the court, that all the modifications contained in the act would be given the retroactive effect. And, hence, where conveyances were good at common law, and only void under the provisions of the Bankrupt Act, it was competent for Congress to repeal the law, modify, or change it, and such change will be enforced by the courts in all cases where rights were not, before the enactment, fixed and settled. The invalidity of this conveyance not having been declared by the proper tribunal before the passage of the amendment, and not being void by the common law, must be tested by the law as amended.

Without further comment upon the pleadings and proof, I am satisfied that the proof fails to show that the defendants at the time they obtained this conveyance *knew* that the conveyance was in fraud of the provisions of the act as already defined, and for the want of the establishment of this fact, the prayer of the bill must be refused and the conveyance held valid.

In re Bledsoe.

UNITED STATES DISTRICT COURT—W. D. TEXAS.

A sale of land free from incumbrances, does not pass to the purchaser the bankrupt's right to any portion of the growing crops thereon, stipulated to be paid him by way of rent.

In re BLEDSOE.

DUVAL, J.—In this case a controversy has arisen between Isaac Bernstein & Co. and L. & H. Blum, of the city of Galveston, creditors of said bankrupt, and the assignee of the estate, Wall. Brown. The most material facts to be considered are the following, viz. :

Bledsoe became a voluntary bankrupt on the 7th of April, 1874. To secure the above-named creditors in a debt he owed them, he had executed a deed of trust in their favor on two hundred and sixty-five acres of land. The date of this deed does not appear, but it was made some time prior to the filing of the petition in bankruptcy.

After the adjudication was had, and an assignee appointed, this court was asked for an order requiring the trustee to sell said land, to satisfy the lien created by the trust deed. The order was made, and the land sold on the 11th day of August, 1874. The creditors above named became the purchasers, and received a deed in fee from the trustee. It seems that some time prior to his bankruptcy, Bledsoe had rented certain portions of the land, for which the rentors had agreed to pay him a certain proportion of the crops raised thereon. It is now contended by the purchasers, under the sale aforesaid, that they were entitled, by virtue of such purchase, to so much of the crops then growing upon the land, as the rentors had promised to pay Bledsoe, or the value thereof, less the costs incurred by the assignee in collecting and disposing of the same, etc. And this they now seek to recover by this proceeding.

The sole question involved is this: After a party has been adjudicated a bankrupt, the assignee appointed, the proper deed of assignment made, etc., does a sale of the

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bankrupt's land, made under order of the Bankrupt Court, to secure a lien thereon, pass to the purchasers the bankrupt's right and title to any portion of the growing crops thereon, stipulated to be paid him by way of rent ; or does it go to the assignee as part of the assets of the estate, for the benefit of the general creditors?

My opinion is that the contracts for rents in kind are properly *choses in action*, and did not pass by a sale of the land to the purchasers. I think this is so, under the provisions of the Bankrupt Act, though the rule may be different in ordinary cases of sale of land, between vendor and vendee, where there is no reservation expressed as to growing crops.

The contracts of rent made by Bledsoe enured and passed to his assignee in bankruptcy.

It is therefore ordered and adjudged that the suit of petitioners be dismissed at their costs.

NOTE.—The above decision was reviewed, on appeal, by Hon. W. B. Woods, United States Circuit Court Judge, at Austin, January Term, 1875, and by him affirmed.

UNITED STATES DISTRICT COURT—W. D. TEXAS.

The District Court, in an involuntary case, has no authority under a provisional warrant to order the seizure of property from the possession of a person to whom the debtor transferred it before the filing of the petition. 394. 319
The District Court, in an involuntary case, may issue an injunction to prevent the disposal of property by a person to whom the debtor has transferred it.

In re GEORGE B. HOLLAND, Jr.

DUVAL, J.—On the 20th day of December, 1873, certain creditors of George B. Holland, Jr., filed their petition in this court, seeking to have him adjudged a bankrupt, which proceeding is still pending and undetermined. Among other things, the said creditors charged that a certain stock of goods, wares, and merchandise had been fraudulently trans-

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ferred by said George B. Holland, Jr., to his father, George B. Holland, Sr., and a writ of seizure was thereupon issued out of said court, commanding the marshal to seize and take the same into his possession. By authority of this warrant, the marshal accordingly seized the goods on the 26th day of December last, and took them out of the possession of Holland, Sr., and now holds them subject to the order of the court.

The said George B. Holland, Sr., now files a petition representing to the court that he purchased said goods from his son on the 27th day of October last—that the purchase was made in good faith, for a fair and valuable consideration, without intention to defraud creditors, and without any knowledge on his part that his son owed anything on said stock of goods; and he prays that so much of said warrant as specially directed the seizure thereof, be annulled and set aside, and the marshal ordered to restore the same to his possession.

I do not think the 40th Section of the Bankrupt Act confers authority upon the court, on the filing of a petition by a creditor, to order the seizure of any property or effects, except such as belong to, and are in possession of the debtor. No authority is conferred for ordering the seizure of property from the possession of a person to whom the debtor had transferred it prior to the filing of the creditor's petition.

George B. Holland, Sr., was no party to the proceedings when the warrant of seizure was issued, and the goods appear to have been purchased by, and conveyed to him, some two months previously. The question of the *bona fides* of the sale and transfer by Holland, Jr., to his father, and whether it was in fraud of the rights of creditors, etc., is one which can only be raised and determined by a proper judicial proceeding. Until this is done, Holland, Sr., is entitled to the possession of the property. If Holland, Jr., is adjudicated a bankrupt, suit may be brought by his assignee to subject the property or its proceeds, to the claims of creditors, and in such action Holland, Sr., must be a defendant, with the right of being heard.

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While it is my opinion that the writ of seizure was improvidently issued in this case, so far as it authorized the marshal to take the goods from the possession of Holland, Sr., the section of the Bankrupt Act, above referred to, clearly authorizes a writ enjoining and restraining Holland, Sr., from making any disposition thereof, until the further order of the court, and this would have been the process proper to be used.

It is, therefore, ordered, that so much of the warrant aforesaid, as authorized the seizure of said goods in possession of Holland, Sr., be annulled and vacated, and that the same be restored by the marshal to his possession. It is further ordered, that a writ of injunction do issue at the same time, restraining the said Holland, Sr., from selling or otherwise disposing of said goods, until the assignee of Holland, Jr. (in case the latter be adjudged bankrupt), has a reasonable time for asserting his rights thereto, if he has any, by a suit for that purpose, or until the further order of the court in the premises.

SUPREME COURT.—WISCONSIN.

An action for the malicious abuse of the garnishee process is an action for a personal injury, and does not pass to the assignee.

A right of action for a mere personal injury does not pass to the assignee. If the assignee does not intervene, a pending action may be prosecuted in the name of the bankrupt.

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APPEAL from the County Court of Milwaukee County.

This action was brought to recover damages for the alleged malicious abuse of legal process by the defendant in certain garnishee proceedings, instituted by him in aid of and collateral to an action on contract theretofore brought by defendant against the firm of Noonan & McNab, of which firm the plaintiff in this action was a member. In the progress of the action, the defendant interposed a supplemental answer,

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which alleges that after the service of the original answer, the plaintiff and the firm of Noonan & McNab, were adjudged bankrupts by the District Court of the United States for the Eastern District of Wisconsin, upon the petition of the plaintiff; that one James G. Flanders was duly appointed assignee in bankruptcy, and has duly qualified as such; and that all of the property and assets of the plaintiff have been assigned to such assignee, to whom the interest of the plaintiff in the fruits of this action has passed, and who is the only proper person to prosecute the same; and it prays for a stay of proceedings until the matters therein alleged are adjudicated.

The plaintiff demurred to the supplemental answer on the ground that it did not state facts sufficient to constitute a defense.

The complaint alleges that, by reason of the malicious abuse of the garnishee processes therein mentioned, the plaintiff was hindered and delayed in the collection of the debts owing to him by the persons upon whom such processes were served; that his credit was injured, and he was vexed, annoyed, and embarrassed in his business, and was compelled thereby to sell a large amount of property at a sacrifice of several thousands of dollars, and suffered other damages therein stated. The County Court made an order sustaining the demurrer, from which the defendant appealed.

John J. Orton, appellant, in person, with *E. G. Ryan*, of counsel.

First.—Under the Bankrupt Law, the assignee alone can prosecute the action. The term “chose, in action,” embraces rights of action *ex delicto*, as well as *ex contractu*. 2 Black’s Com., 396–7; 2 Stephen’s Com., 74; 2 Kent, 351; 1 Chitty’s Gen. Prac., 99; Jacob’s Dic., title “Chose.” The term is equivalent to the *right to recover*, whether on contract or tort. It holds no distinction as to the character of the action. The object and policy of the Bankrupt Law is to vest the bankrupt’s whole property, except exemptions, in the assignee, for the creditors. A judgment for tort recovered, and the right of action, belong equally to the assignee. Section 19, indeed,

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embraces judgments in tort against the bankrupt, and excludes actions in tort against him, from debts provable; but this is probably upon the grounds: 1. That a right of action in tort does not make the person who has it a *creditor* of the bankrupt; and 2, that the inclusion of actions of tort against the bankrupt would necessarily carry with it, on principle, all his liabilities in tort; which would be a stirring up of litigation, against the policy of the law, and introduce additional confusion into proceedings under the act. The exceptions in Section 14 come within the rule *expressio unius exclusio alterius*. Again, that section specifically vests in the assignee all causes of action for taking, detaining, or injuring the property of the bankrupt. The garnishee proceeding, as set up in the complaint, was a detention of his property, and an injury to his business and property, within the meaning of the act.

Second.—The supplemental answer is good in another view. The garnishee proceeding was instituted under Chapter 200, Laws of 1864. It is based on the statement that the plaintiff has reason to believe, and does believe, that the defendant has not property enough to satisfy the plaintiff's demand. The statute aims to give a remedy to creditors unknown to the common law, in anticipation of the insolvency of the debtor between suit brought and judgment; hence, the construction that the statute has relation only to the solvency of the debtor at the time of suing out the garnishee process, would defeat its purpose. As the process is to go upon the future condition of the debtor, which must be uncertain, it goes upon the belief of the creditor, and does not proceed upon the *fact*. The term "liable to execution," and the technical word "satisfy," taken together, show the meaning of the statute to be that the affidavit relates to property which the debtor then had, and which he *will continue to have*, subject to the plaintiff's execution, and sufficient to satisfy the plaintiff's judgment. 27 Wis., 594. The subsequent bankruptcy of the plaintiff and his firm is, therefore, a fact tending strongly to justify the garnishee proceeding complained of in this action. And as it occurred after the action was brought

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and answer made therein, it could not be given in evidence under the principal answer, and was therefore the proper subject of a supplemental answer.

· *Jason Downer*, for the respondent.

First.—It is the gist of the action to recover damages: 1. For injury to the credit of Noonan; and 2, for annoyance, vexation, and expense in defending malicious and groundless suits brought to tie up property, by which it was rendered temporarily useless, and embarrassed, and thrown into bankruptcy. The action arises out of the malicious abuse of legal process, and the gist of it is, acts done by the defendant maliciously to injure the plaintiff; and the plaintiff is entitled to exemplary damages.

Second.—Neither the U. S. Bankrupt Act (Section 14), nor the English Bankrupt Act, embraces or transfers to the assignee any right of action in tort except such as may be brought to recover specific property or its actual value, or damages for its use and detention. *Crockett v. Jewett*, 2 N. B. R., 208; *Brewer v. Dew*, 11 M. & W., 625; *Spence v. Rogers*, *Id.*, 191; s. c., 13 M. & W., 571; s. c., 12 Clark & Fin, 700; *Clark v. Calvert*, 8 Taunt., 742.

Third.—Actions in tort to recover exemplary damages do not pass to the assignee. See cases above cited, and *Sommer v. Wilt*, 4 S. & R., 19, 28; *O'Donnel v. Seybert*, 13 S. & R., 54.

Fourth.—Even if the assignee has a right to interpose, unless he does so, the plaintiff may prosecute the action. *Clark v. Calvert*, 8 Taunt., 742, and cases cited; *Fowler v. Down*, 1 Bos. & Pul., 44; *Webb v. Fox*, 7 Term, 391.

LYON, J.—The principal question to be determined is, whether the Bankrupt Law of 1867 (14 Stats. at Large, 517) vests in the assignee in bankruptcy the plaintiff's right of action stated in the complaint.

It is necessary, in the first place, to determine the character of the action. Notwithstanding the averments in the complaint of special damages and losses sustained by the plaintiff in his business, in consequence of the alleged mali-

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cious acts of the defendant, we think the action is, essentially, to recover damages for a personal injury, as distinguished from an injury to property. It is true that the effect of the wrong complained of was (as is alleged) to diminish the estate of the plaintiff, and render him less able to pay his debts. But the same results might follow any other personal injury. An assault and battery might disable a person for his business or labor for a long time or permanently, and subject him to heavy losses and expenses, and thus materially reduce his estate and his means with which to pay his debts. Yet it will not be claimed that an action to recover damages therefor would be an action to recover for injuries to property. Notwithstanding those incidents affecting the property and estate of the injured party, it would still be an action for an injury to the person. A libel or a slander might deprive a man of employment, destroy his credit, ruin his business, and greatly impair his estate; yet an action therefor would be an action for a personal injury, the effect of the wrong on the estate of the injured party being merely incidental. So in this case. The personal injury is the *gravamen* of the action, and the effect of the alleged malicious acts of the defendant upon the estate of the plaintiff is incidental merely. Such effect is an element to be considered in assessing damages, but does not and cannot change the character of the action.

We are now to inquire whether the Bankrupt Law transfers a right of action of this nature to the assignee in bankruptcy. The 14th Section of that law, after enacting that all of the estate, real and personal, of the bankrupt (except certain specific property), shall vest in the assignee, further provides as follows: "All of the property conveyed by the bankrupt in fraud of his creditors: all rights in equity, choses in action, patents, and patent rights and copy-rights; all debts due him or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, or from the unlawful taking or detention of or injury to the property of the

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bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for and recover, or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy, and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate, debts, and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party, in his own name, in the same manner, and with the like effect as they might have been prosecuted or defended by such bankrupt" (p. 523). There are some general words in the above provisions of the law, which, if not restricted by other words therein, are doubtless sufficiently comprehensive to include this cause of action; for certainly it is a "chase in action," or a "right of action."

The law first names "choses in action" generally, as vesting in the assignee, and then proceeds to specify that "all his rights of action *for property or estate, real or personal*, and for any cause of action which the bankrupt had against any person, arising from contract or from the unlawful taking or detention of or injury to the *property* of the bankrupt," shall be so vested. We are of the opinion, that the words last quoted qualify and limit the preceding general words, and hence that the "choses in action" for torts which pass to the assignee, are rights of action for real or personal property, or for the unlawful taking or detention of property or for injuries thereto, and not causes of action for merely personal injuries.

The provision that the assignee may prosecute and defend, in his own name, *all* suits to which the bankrupt is a party, is doubtless limited by the preceding provision, which authorizes the assignee to sue for and recover "the estate, debts, and effects" of the bankrupt. He can only sue for the property or rights of action which passed to him by virtue of the adjudication and his appointment as assignee; and hence he

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can only prosecute in his own name actions of like character, in which the bankrupt is a party.

That there are some rights of action which do not pass to the assignee, may also be inferred from the provisions of Section 16, which authorize the assignee to prosecute, in his own name, actions pending in the name of the bankrupt, "for the recovery of a debt or other thing *which might or ought to pass to the assignee*," clearly implying that there are rights of action which do not pass to the assignee.

Furthermore, it is scarcely reasonable to suppose that Congress intended to vest in the assignee a right of action which would be destroyed by the death of either party thereto. That this cause of action does not survive in favor of or against the representative of a deceased party, is very clear. At the common law, no action *ex delicto*, in which the appropriate plea was "not guilty," so survived. The maxim *actio personalis cum persona*, was applicable to all actions of that class. But a very ancient statute—that of 4 Edw. III., Ch. 7, enacted about the year 1330—gave a remedy to executors for a trespass to the personal estate of their testators, which remedy, by equitable construction, has been extended to administrators. 1 Chitty's Pl., 68. In this State the list of actions which survive is materially enlarged by statute. R. S., Ch. 135, Sections 2, 6, 11, and 12 (Tay. Stats., 1572-74). But in this list we fail to find enumerated actions for malicious prosecution or malicious abuse of legal process. These remain as at common law, and the death of a party thereto is the death of the action. *Nettleton v. Dinehart*, 59 Mass., 543.

Neither is this cause of action assignable, either at law or in equity, and we fail to find sufficient in the Bankrupt Law to satisfy us that Congress intended to make it assignable.

There is a singular absence of decisions on this subject by the Courts of the United States. We are referred to but one case (*Crockett v. Jewett*., 2 N. B. R., 208); and that one fully sustains our construction of the law. The facts of that case, and the principles decided therein, will sufficiently appear from the following extract from the opinion of Judge

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Blatchford. He says "The claim against Black Bros. & Co. is shown to be a claim in suit arising from the fact that Black Bros. & Co. recommended a certain person to the copartnership [that is, to the bankrupt firm] as worthy of trust, and that the copartnership, on such recommendation, entrusted merchandise to such person for sale, and he disposed of it and did not account for the proceeds. The suit is brought for fraudulently and deceitfully recommending the person as worthy of trust and confidence. Such a claim is not within the description in the 14th Section of the act, of the assets which pass to the assignee in bankruptcy. It is not a debt, or a security for a debt, or a right in equity, or a chose in action, or a right of action for property. Nor is it a right of action for a cause of action arising from contract. It is an action of tort for the fraud and deceit, and not an action on a contract." Surely, if that cause of action did not pass to the assignee, this does not. Our conclusion is, that the cause of action in this suit did not pass to the assignee, but remains in the plaintiff, notwithstanding the adjudication in bankruptcy and the appointment of such assignee.

But if such conclusion is wrong, we are yet unable to perceive why the action should abate, or the proceedings therein be stayed. The 16th Section of the Bankrupt Act makes it the duty of the court, in a proper case, to admit the assignee to prosecute a pending action in his own name *if he requires it*. This provision is understood to apply to suits pending in the State courts as well as those pending in the Federal courts. Bump on Bankruptcy, 343. We suppose that the assignee may, if he choose, permit the action to proceed in the name of the bankrupt. The practice seems to be analogous to that prescribed by statute, when certain causes of action are transferred *pendente lite*. "The action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." R. S., Ch. 135, Section 1. (Tay. Stats. 1572, Section 1.)

It is argued by the learned counsel for the defendant

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that the facts stated in the supplemental answer show, or tend to show, that the defendant was justified in instituting the garnishee proceedings, and that the statements in the affidavits, by which such proceedings were commenced, are true.

If this is a correct position, the matter stated in the supplemental answer is in bar. But it is not so pleaded. A supplemental answer is the substitute for a plea *puis darrein continuance*, under the old practice, and may be either in abatement or in bar. In this case it is evidently interposed as a plea in abatement only: for the prayer that the proceeding be stayed, etc., is equivalent to a prayer for judgment if the court will proceed, etc., which is peculiar to a plea in abatement. 1 Chitty's Pl., 660.

But in any event, if the facts stated in the supplemental answer are material to the issue in this case (a point which we do not decide), we think the original answer is sufficiently broad to entitle the defendant to prove such facts on the trial, without the aid of the supplemental answer.

Upon the whole case therefore, we are of the opinion that the demurrer to the supplemental answer was properly sustained.

By the court, Order affirmed.

UNITED STATES DISTRICT COURT—INDIANA,

A creditor who holds a debt against a bankrupt, whose liability arises by his accommodation indorsement of bills of exchange, to secure the payment of which the drawers and acceptors have given certain collateral security, may prove his debt as unsecured.

In re DUNKERSON & CO.

Asa Iglehart, for the bank.

A. L. Robinson, for Lowrey & Co.

McDONALD, J.—This case is before me on a certificate of

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a Register in bankruptcy, under the 6th Section of the Bankrupt Act.

To develop the matter to be decided, perhaps I cannot do better than to copy the substantial part of the Register's certificate. He certifies that: "The Evansville National Bank presented to him in due form their deposition, accompanied by a statement in due form, showing that said bankrupts were indebted to said bank, as indorsers of sundry bills of exchange, in the sum of ninety-eight thousand six hundred and sixty-six dollars and sixty-six cents. Copies of the bills of exchange, upon which the liabilities of the bankrupts were founded, accompany the statement and deposition, and show that Watts, Crane & Co., and Watts, Given & Co., and Given, Watts & Co.—all of which firms are wholly disconnected with the bankrupts—are severally and respectively drawers, indorsers, and acceptors of these bills of exchange, upon all of which the bankrupts are the last indorsers. The vice-president of the bank who makes the deposition, appends this statement: 'That said bank holds a claim against George R. Preston, for four thousand five hundred dollars, due January 1, 1869, which was procured upon proceedings supplementary to execution upon a judgment obtained against William Brown (of Watts, Crane & Co.), one of the acceptors of the bills of exchange above set forth; that the claim is of the value of \$—; that said bank also holds sundry notes secured by mortgage, of which copies are hereto attached, marked B., and which were in May, 1867, the property of Watts, Crane & Co., and which were then given to R. K. Dunkerson, of R. K. Dunkerson & Co. (who were the accommodation indorsers for said several firms, who are the principal debtors to said bank upon the liabilities herein set out and proven), to indemnify said bankrupts against said indorsements, and also for the better security of the bank as well; that said collaterals were held by and for said bank more than six months before the bankruptcy; that the value of said collaterals is unknown to affiant. The debt claimed by said bank against said bankrupts is the whole amount of said

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bills, irrespective of said claim against said Preston, and irrespective of said collaterals.' But W. J. Lowery & Co., who are creditors of said bankrupts, and who had proven their claims in due form, objected to the proof of said claim for the full amount or for any amount, unless said bank would surrender said lien upon the claim against said Preston, and said collaterals, or have the same appraised and their value settled by the assignee, who had before that time been appointed, or have the same sold and the value thereof deducted from the amount shown to be due said bank, and the proof allowed for the balance, in accordance with the 20th Section of the Bankrupt Act. But said bank wholly refused to have said claim and said collaterals sold in accordance with the provisions of said section, or to have the same appraised or the value thereof agreed upon in accordance with the provisions of said section, or to release or deliver the same up in accordance with the said provisions of said section; but claimed unconditionally the right to make proof of the whole amount due upon said bill of exchange, so indorsed by said bankrupts."

Upon this state of facts, it appears that the Register allowed the entire claim of the bank against the estate of the bankrupts, to the sum of ninety-eight thousand six hundred and sixty-six dollars and sixty-six cents, and placed the same on the list of claims proved and allowed. Whereupon the parties agreed that the Register should certify the whole matter to me for my decision.

From the facts certified by the Register, I conclude that the only question for decision is the following: Is the bank bound to give up the collaterals named, or to make any arrangement concerning them, before being permitted to prove its whole debt of ninety-eight thousand six hundred and sixty-six dollars against the bankrupts Dunkerson & Company?

It would seem from the Register's certificate that the creditors who insist on the affirmative of this question, do so on the sole ground that the 20th Section of the Bankrupt

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Act requires it. And, as we are aware of no other provision of that act to which the question under consideration is applicable, we suppose that a proper construction of that section must be decisive of the question.

Before proceeding to consider the 20th Section of the act, it may be well, however, to inquire what relevancy the note of four thousand five hundred dollars, held by the bank on George R. Preston, has to the merits of the present case. It appears that the bank had coerced that note from William Brown, one of the acceptors of said bills of exchange, and a partner in the firm of Watts, Crane & Co., by a proceeding supplementary to execution. But what connection the bankrupts or any of their creditors, except the bank, have with this note does not appear. The Register's certificate, indeed, states that the proceeding supplementary to execution was upon a judgment against Brown, "one of the acceptors of the bills of exchange," on which the claim of the bank for ninety-eight thousand six hundred and sixty-six dollars is founded. But the certificate does not state that this judgment was rendered on Brown's acceptance of those bills; and I cannot presume that it was. I must, therefore, wholly disregard the note on Preston in deciding the question under consideration.

The matter, then, is reduced to this: divers bills of exchange amounting to ninety-eight thousand six hundred and sixty-six dollars are drawn, accepted, and indorsed by several mercantile firms to procure accommodation indorsements of them, and to the bank to discount them. Dunkerson & Co. and the bank ask some collateral security. It is given them by the deliverance to the bank of "sundry notes secured by mortgage, and which, in May, 1867, were the property of Watts, Crane & Co., and Given, Watts & Co." Thereupon Dunkerson & Co. indorse the bills and the bank discounts them. They are dishonored. Dunkerson & Co. become bankrupts. The bank offers to prove the bills as debts against them for dividends out of their assets. Certain creditors object, unless certain things proposed to be done

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under the 20th Section of the Bankrupt Act are first performed. This seems to be the substance of the whole matter. And it involves this question: when a creditor holds a debt against a bankrupt whose liability arises by his accommodation indorsement of bills of exchange, to secure the payment of which, the drawers and acceptors of the bills have delivered to the creditor "sundry notes" as collateral security, may the creditor prove his whole debt and have it allowed against the estate of the bankrupt without regard to these collaterals?

If this question should be answered in the affirmative, it must be because the provisions of the 20th Section of the Bankrupt Act do not reach the case. On a careful examination of that section it will plainly appear that in its letter it does not comprehend the case under consideration. For, so far as it relates to mortgages, pledges, and liens at all, the letter of the section only includes "a mortgage or pledge of real or personal property *of the bankrupt* or a lien *thereon*." Now, it is not pretended that the collaterals in question were ever the property of the bankrupts, Dunkerson & Co. On the contrary, the Register's certificate distinctly states that they were the property of Watts, Crane & Co. and of Given, Watts & Co. Clearly, therefore, if we are strictly to construe the section according to its letter, it does not extend to the present case, and the Register was right in passing the whole claim of the bank.

But it is a very grave question whether this section should be thus strictly construed. Rather, ought we not to construe it liberally and according to its spirit? There are plausible reasons for the latter construction. In the first place, it is the obvious policy of the Bankrupt Law to favor equity among *bona fide* creditors. Equitable principles pervade that law; and "Equity loves Equality." If we construe the 20th Section of the act strictly and literally, we give the bank an advantage over the general creditors of the bankrupts; if liberally and according to its spirit, we may put them all on an equality. We are bound, therefore, if we can without

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violence to the language of this section, so to construe it as to extend its operations to the case at bar.

Moreover, if in this case instead of Dunkerson & Co., Watts, Crane & Co., who are the principal debtors on these bills, were the bankrupts, it would be very clear that the bank would not be allowed to prove any part of its debt, without first disposing of the collaterals, as required by said 20th Section. And; since the debt is one and the same, since Watts, Crane & Co. are the principal debtors, and Dunkerson & Co. but sureties for them, is it equitable that facts which would avail to prevent the proof and allowance of this debt, as against the former company, if they were bankrupts, cannot avail to the same purpose, when the latter are bankrupts? As to principal and surety, it is a general rule that the surety may resist payment on any ground which would be a good defense on the part of the principal.

Furthermore, the same reason which requires a creditor, holding a lien for his debt on a bankrupt's property, to dispose of that lien according to Section 20 of the act, before proving his debt, equally applies, where he holds the lien on the property of some other person. The only reason in both cases seems to be, that it is not equitable to permit a creditor of the bankrupt, holding collateral security for his debt, first to prove the whole of it, and share equally with other creditors for the whole of it out of the common fund, and afterwards to resort to his collateral security, to put him in a better condition than that of other creditors. The section in question virtually says to the lien-holder, If you ask equity, you must do equity. Since your lien puts you in a better condition than other creditors, if you want a dividend out of the common fund, you must first deduct from your debt the value of your lien, and take your dividend on the residue of your debt; or you must release your lien to the assignee, and, thus putting yourself on a footing with other creditors, take the dividend on your whole debt; or, if the property on which you hold your lien is worth more than your debt, you may keep it in satisfaction thereof, and, instead of asking a divi-

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dend, pay the excess of its value into the common fund for the use of other creditors.

If we adopt this line of reasoning, we should conclude that the provisions of the 20th Section of the act, extend to the case at bar. And it must be confessed that such a conclusion is supported by several respectable authorities. *Lanckton v. Wolcott*, 47 Mass., 305; *Amory v. Francis*, 16 Mass., 308; *Richardson v. Wyman*, 70 Mass., 553.

But the conclusion to which this line of reasoning leads, is attended with serious if not insuperable difficulties. Indeed, I think a construction of the section in question, founded on this reasoning, involves absurdities which cannot be tolerated. Some of these are as follows :

First. This section provides for a sale, in certain cases, of the property on which the lien attaches. Now, whether the property be personal or real, there is generally, in such cases, an equity of redemption. This exists in the person who is the general owner of the property. If he is the bankrupt, a sale of the property under the direction of the court, would vest a good title in the buyer, because the holder of the equity of redemption is not the bankrupt, but a stranger. No such sale could vest his interest in the buyer. This remark applies only to a sale by agreement of the lien-holder and the assignee, authorized by said section.

Second. This section provides that in certain cases, the lien-holder may retain the property at its value, and prove for the residue of his debt. This provision evidently contemplates the vesting of a perfect title to the property, including the equity of redemption, in the creditor. But this could not be done, unless the property, when the lien attached, belonged to the bankrupt.

Third. The section under consideration provides that, if the value of the property on which the lien attaches, exceeds the debt secured by it, "the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess." Obviously this could not be done in the present case, though the collaterals exceeded in value the debt due to

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the bank. For as these collaterals never belonged to the bankrupts, they never had any equity of redemption in them. Consequently, the assignee could not release these "bankrupts' right of redemption therein."

Fourth. This section provides that, in certain cases, the assignee shall "sell the property subject to the claim of the creditor thereon," and "shall execute all deeds and writings necessary or proper to consummate the transaction." This plainly means that he may sell and convey the equity of redemption. Clearly he has power to do this, whenever the equity of redemption is in the bankrupt; for he officially represents the bankrupt's interests, or rather the bankrupt's interest is vested in him. But if the property on which the lien attaches never belonged to the bankrupt, he never had any equity of redemption in it, and so no such thing could vest in his assignee, or be sold or conveyed by him.

These considerations, viewed in connection with the unequivocal language of the 20th Section of the Bankrupt Act, confining its provisions to mortgages and pledges "of real or personal property of the bankrupt, or a lien thereon," lead me to the conclusion that no reasonable construction of the section can extend its provisions to liens of the creditors of a bankrupt, on property of which he was never the owner.

In this conclusion, I am supported by high authority. Under the English Bankrupt Law, which does not differ much from our own on the points relating to the question under consideration. The rulings of the judges will be found to agree with the conclusion to which I have come in this case. See *Ex parte Bennet*, 2 Atk., 527; *Ex parte Parr*, 18 Ves., 65; *Ex parte Goodman*, 3 Mad. Ch. R., 373; *Ex parte Plummer*, 1 Atk., 103.

My ruling in this case is also in conformity with a decision of Mr. Justice Story, under the Bankrupt Law of 1841, in the case of *Babcock* (3 Story, 393). That case was very much like the present; and the learned judge held that a distinction must be taken between the case of a security given

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to the creditor by the bankrupt himself, of his own property, and the case of a security of a third person transferred to the creditor by the bankrupt or otherwise. And he decided that "in the former case, the creditor is not allowed to prove his debt against the bankrupt, unless he surrenders up the security, or it is sold with his consent, and then he may prove for the residue of his debt, which the security, when sold, does not discharge. In the latter case, he may prove his debt in bankruptcy, without surrendering the security of the third person, which he holds, and may, notwithstanding such proof, proceed to enforce his security against such third person, provided, however, he does not take, under the bankruptcy and the security, more than the full amount of his debt." In my judgment, precisely so may the Evansville Bank do, in the case at bar.

I am gratified to find, that I am fully sustained by a late decision, of Judge Fox, of the District of Maine, in the matter of Nathaniel O. Cram, 1 N. B. R., 504, made under the present Bankrupt Law. That case was almost in every respect like the present. The Casco National Bank presented a claim against the estate of Cram, the bankrupt, on note for eighty thousand nine hundred dollars, executed by a manufacturing company, and indorsed by Cram. These notes were secured by mortgages on personal and real estate, executed by the manufacturing company to the bank. It was objected, that proof of the debt in favor of the bank could not be allowed, without first deducting the security held by it. And this objection was made as in the present case, under the provisions of the 20th Section of the Bankrupt Act. But the learned District Judge, in an elaborate and exceedingly well reasoned opinion, overruled the objection, and ordered the proof to be taken. I entirely approve his reasoning and his decision.

The doings of the Register, Charles H. Butterfield, Esq., in the premises, are approved and affirmed, which is ordered to be certified, etc.

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UNITED STATES DISTRICT COURT—E. D. WISCONSIN.

A debt barred by the statute of limitations of the State in which the proceedings in bankruptcy are pending is not provable against the estate of the bankrupt, and cannot be reckoned in computing the number necessary to join in an involuntary petition.

In re THEODORE NOESEN.

DYER, J.—The single question here presented is, whether a claim barred by the statute of limitations of the State of Wisconsin is provable in bankruptcy. The question arises upon a contest between the petitioning creditors and the debtor, the latter seeking to defeat the petition on the ground that one-fourth in number and one-third in amount of creditors, holding provable debts against him, have not joined in the petition. To support this claim he interposes demands against himself in favor of his father-in-law, on their face barred by the statute of limitations.

The Bankrupt Act provides, that a petition for adjudication must be made by one or more of the debtor's creditors, who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts provable under the act amounts to at least one-third of the debts so provable. Is a demand, barred by the statute of limitations of this State, a debt, owing by the bankrupt and provable under the act? In England the question has been put at rest by adjudications that a debt the recovery of which, by action, may be defeated by a plea of the statute of limitations, cannot be proved in bankruptcy. *Ex parte Dewdney*, 15 Ves., 479; *In re Clendening*, 9 Irish Eq. Rep., N. S., 284; 1 Christian Bankruptcy, 221.

Four cases are reported in the 1st volume of N. B. Register Reports, which I proceed to notice.

In re Kingsley, 1 N. B. R., 329, one of the questions was, whether a debt barred by the statute of limitations of the State of Massachusetts, where the bankrupt then resided, and where the proceedings were had, but not barred by the statute of limitations of Vermont, where the creditors re-

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sided, and where both parties resided when the contracts were made, could be proved against his estate in bankruptcy. Upon a full discussion of the question, Judge Lowell decides, that a debt barred by the statute of limitations of the State where the bankrupt resides, cannot be proved against his estate in bankruptcy. The decision is made to rest upon the English authorities and upon the principle that statutes of limitation are remedial, and that after the lapse of the statutory period for bringing actions, payment must be presumed. It must, however, be observed, that in this case, the question was whether the claim *could be proved*, not whether it was *provable*. Judge Lowell says "there can be no doubt that this is a provable debt, and that it will be discharged by the certificate, if the bankrupt obtains one. All debts which by their nature are provable are discharged, whether they in fact could be proved or not. * * * * Because this debt is provable, it does not follow that it can be proved. The question is whether it is a debt at all, * * *. Applying the law of the forum, I find as a presumption of law, that this provable debt has been paid." Thus a distinction is taken between a provable debt, and a debt which, though provable, cannot be proved. So that it will be seen, this case is not an authority fully applicable to the question we have here, for the point here is, is such a debt provable?

In re Harden, 1 N. B. R., 395, Judge Fox, following Judge Lowell, holds that a debt barred by the statute of limitations of Maine, where the bankrupt resided, could not be proved against his estate in bankruptcy by a creditor resident in another State. He says, "I have no doubt that for the purposes of the discharge, these demands are to be considered as provable debts, and that if the bankrupt obtains his discharge, he will be protected against them. Such demands are of a provable character, but are no longer due and payable within the meaning of the act, because the law of the forum, designated by Congress for the adjudication of the matter, presumes they are paid, and a paid demand no

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longer exists as a provable legal cause of action against the debtor."

In re Sheppard, 1 N. B. R., 439, Judge Hall, adopting the views of Judge Blatchford, in a case which will be next noticed, holds that a debt barred by the statute of limitations of the State in which the bankrupt resides, may still be proven against his estate in bankruptcy. The principles he invokes are, that a debt against which the statute of limitations has run is still a debt; that the operation of the statute does not extinguish the debt, but only affects the remedy, and that statutes of limitation have no effect beyond the territorial limits of the State enacting them.

In re Ray, 1 N. B. R., 203, Judge Blatchford gives to the question an elaborate examination. Conceding the rule in England to be as stated, he makes a distinction between the English statute of limitations, and the statute of limitations in the American States. He says, "The English Bankruptcy Law is co-extensive as to territorial operation with the English statute of limitations. The Bankrupt Act of the United States operates in all the States as well as in New York. Under these circumstances, I think," he says, "that a debt to be barred by limitation, so as not to be provable under the Bankrupt Act, as not being due and payable, must be shown to be barred throughout the United States."

Referring to the statute of limitations of New York as applicable to simple contracts, and which is identical in language with the Wisconsin statute, Judge Blatchford holds it to be a statute affecting the remedy only, and not the contract, and says it could never be "invoked as a bar to an action in another State," on the contract. He says further in his opinion, that "a complaint setting out a cause of action, which appears to have accrued more than six years before the action was commenced, is not objectionable on its face or open to a demurrer. The defense of the limitation must be set up by answer. If it is not so set up, it is waived."

Recognizing the distinction between a law which extinguishes the contract as the result of limitation, and a law

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which simply limits the time within which an action may be commenced upon the contract, and holding that a law of the latter character cannot be invoked as a bar to an action on it in another country, he construes the statute of New York as not barring the debt, and as not affecting the contract, but as merely reaching to the remedy; and so concluding that a debt is provable in bankruptcy, unless barred throughout the United States.

Thus it will be seen from these decisions, that the question turns upon the point as to whether the effect of the statute is to destroy the contract, and extinguish the liability, or merely to affect the remedy on the contract.

Without considering the distinction taken by Judge Blatchford on the English decisions, upon which he concludes, that a debt must be barred throughout the United States, so as to make it a debt not provable under the Bankrupt Act, it is sufficient to say that the courts of this State place upon the statute of limitations a construction radically different from that given by Judge Blatchford. To illustrate—although the statute of Wisconsin like the statute in New York, requires that the defense of the statute of limitations must be set up by answer; the Supreme Court of this State have held, that where it appears upon the face of the complaint that the plaintiff's claim is barred by the statute, the objection may be taken by demurrer, and that in such case, the demurrer is an answer within the meaning of the statute. *Howell v. Howell*, 15 Wis., 55. See also *New Jersey v. New York*, 6 Peters, 323.

Further, the Supreme Court of this State have held in *Brown v. Parker*, 28 Wis., 21, that the lapse of time fixed by the statute of limitations of this State, as to parties residing therein, does not merely affect the remedy, but extinguishes the right, and that this applies to contract debts, as well as to the title to property. This is a very strong case, and one in which Justice Dixon elaborately reviews the law on the question, holding that under the statute, the debt, by lapse of time, becomes a nullity, and as if no debt or promise had

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ever existed. The result of this decision upon the facts of the case, was, that where a note made in this State, of which the maker and holder were residents, had been barred, and the debt thus extinguished (by the law of this State, as interpreted by its courts), and the note was then sued upon in a court of Illinois, the defense upon the *lex loci contractus*, if set up there, would have been good, and a judgment upon such note entered in Illinois by confession upon warrant of attorney, was relieved against. The principle that, as to parties residing in this State, the statute of limitations does not affect the remedy only, but directly extinguishes the right after the statutory period has elapsed, was also settled in this State in *Sprecker v. Wakeley*, 11 Wis., 432, and *Knox v. Cleveland*, 13 Wis., 245.

Now it is a settled principle that the *lex fori* must prevail as to statutes of limitation. "The Federal courts sitting within the respective States regard their statutes of limitation, and give them the interpretation and effect which they receive in the courts of the State." *In re Cornwall*, 6 N. B. R., 305; *Shelby v. Guy*, 11 Wheat., 361; *McCluny v. Silliman*, 3 Peters, 270; *Green v. Neal's Lessee*, 6 Id., 291; *Ross v. Duval*, 13 Id., 45. Giving to the statute of limitations of this State the interpretation placed upon it by the courts of the State, I must hold that as the parties are residents of this State, the demands in question, being barred by the statute, are extinguished, and are therefore not provable claims against the estate of the bankrupt. They are as if they had never existed.

The views I have expressed, are I think strongly sustained by Judge Woodruff, *In re Cornwall*, 6 N. B. R., 305.

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COURT OF APPEALS.—MARYLAND.

A State court may entertain an action by an assignee, to recover money received by a creditor as a preference. If money is brought into a State court under a *fi. fa.*, the assignee may intervene and claim the fund on the ground that the levy is void under the Bankrupt Law.

If a demurrer to an intervening petition is overruled, the demurrant is entitled to answer and be heard on the merits.

If a cause is heard on petition and answer, the statements in the answer will be deemed to be true.

*JAMES W. JORDAN, Assignee of ISAAC LAMBERD,
v. JOHN DOWNEY.*

APPEAL from the Baltimore City Court.

On the 27th of February, 1873, John Downey brought suit in the Baltimore City Court, against Isaac Lamberd, on two promissory notes, each for the sum of four hundred and fifty dollars, dated February 1st, 1871, and payable respectively eight and twelve months after date, with interest, and drawn by the defendant in favor of the plaintiff. On the same day judgment was rendered by confession in favor of the plaintiff for ten hundred and ten dollars, with interest from the 24th day of February, 1873, and costs. On the 16th of July, 1873, a *fi. fa.* was issued upon this judgment, and upon the 8th of September following, the Sheriff made return of a levy and sale made by him, and of his application of the proceeds of sale to the payment of costs and expenses, leaving a net balance in his hands of seven hundred and ninety-seven dollars and eighty-three cents, which he was ready to bring into court. Subsequent to this return a petition was filed by James W. Jordan, as assignee in bankruptcy of Lamberd, which was afterwards dismissed and a new petition filed by him.

The plaintiff demurred to this latter petition, and after argument the court below (Brown, J.) overruled the demurrer, and delivered the following opinion, in which the substance of the petition is set forth :

“In this case a petition has been filed by James Jordan,

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alleging that the defendant was adjudicated a bankrupt on his own petition on the 29th of July last; that the plaintiff had previously, on the 27th of February last, obtained a judgment in this court against said defendant by his own confession, for the sum of ten hundred and ten dollars and cost; that upon a writ of *feri facias* issued thereon, there was realized from sales of personal property of the defendant, the sum of seven hundred and ninety-seven dollars and eighty-three cents, which, in conformity with the requisition of the writ, and an order of this court, has been paid by the Sheriff into this court; that petitioner is the assignee in bankruptcy of said defendant; that said judgment was a fraud on the Bankrupt Act, because it was confessed at a time when the defendant was unable in the ordinary course of his business to pay his debts, and was hopelessly bankrupt; and that the plaintiff knew said facts, and that said confession of judgment was made in contemplation of bankruptcy, and with a view to prefer the said defendant over his other creditors; and inasmuch as the said judgment is a nullity under the provisions of the Bankrupt Act, the petitioner prays that an order be passed directing the said sum of money to be paid to him.

"To this petition the plaintiff has demurred, thereby admitting the facts stated therein.

"The writ of *feri facias* does not command the Sheriff to pay over to the plaintiff the money which he levies, but to bring it into court, that it may be rendered to the plaintiff in satisfaction of damages. *Warmoll v. Young*, 5 Barn. & Cress., 660.

"Money in the hands of a Sheriff cannot be taken by him in virtue of a *feri facias* on a judgment against the person who is entitled to receive it, but, if the Sheriff brings the money into court, he will be directed to pay it to the creditor whose execution is in his hands against the property of him for whom it was levied. *Harding v. Stevenson*, 6 H. & J., 264.

"A court has the power in a summary way to adjust priori-

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ties among contending executions, and to dispose of money arising from sales thereon. *Williamson v. Johnston*, 7 Halst., 86. If then, this money has vested in the assignee in bankruptcy under the operation of the Bankrupt Law, it would seem to be the duty of this court to direct it to be paid to him instead of the plaintiff in this cause. But it is contended on the part of the plaintiff, that the money has vested in the assignee by reason of a forfeiture declared by the Bankrupt Law, and that all such forfeitures should be enforced by appropriate proceedings in courts of the United States, and that therefore this court has no jurisdiction of the matter. It is not denied that the assignee, as the representative of the bankrupt and of his creditors, would have the right to collect by the aid of a State court an ordinary debt, or any money due to the bankrupt, by virtue of the laws of the State or the principles of the common law, but it is insisted that because the judgment in this case is fraudulent and void by virtue of the provisions of the Bankrupt Law, this court, by directing payment to the assignee, would be enforcing a forfeiture under that act, which it has no right to do.

“In questions growing out of the Bankrupt Law, as in other matters, it is no doubt often difficult to settle the true line of distinction between the jurisdiction of the courts of the States, and those of the United States, but the manner in which the question is presented in this case, relieves it of all difficulty. This court is not called on to institute proceedings to declare a forfeiture under that act, but to pay over a fund actually in court to the person lawfully entitled. The facts are admitted, and no proceedings are necessary to establish a forfeiture.

“It is conceded that the judgment is fraudulent and void under the provisions of the Bankrupt Law. Section 35 of the Bankrupt Law provides that when an improper preference has been given, the assignee in bankruptcy ‘may recover the property, or the value of it, from the person receiving it, or so benefited.’ But the courts of the United States have no

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jurisdiction over a judgment in this court, or over a fund in its custody. This being so, there is no proceeding by which the assignee can obtain possession of the fund, except by filing a petition in this court, and there can be no valid objection to his doing so. It would be strange indeed, if the plaintiff should be held to be entitled to the fruits of a fraudulent judgment for the reason that it is fraudulent, and is therefore made void by the Bankrupt Law. The demurrer must therefore be 'overruled.' "

The plaintiff then answered the petition, making certain denials which are set forth in the opinion of this court.

The case being heard upon the petition and answer, the court below passed an order dismissing the petition, and directing the money in court, after deducting a claim for rent, to be paid to the plaintiff. The petitioner appealed.

The cause was argued before Bartol, C. J., Miller, Alvey, and Robinson, J.

Harris J. Chilton, for the appellant.

A fraudulent assignment, under six months, is, *per se*, an act of bankruptcy under the 35th Section of the Bankrupt Act of March 2d, 1867. A confession of judgment is a transfer of property; if without a stay of execution, it can be made available as a lien at any moment by an execution. Such a transfer, under the six months' clause, is about the same kind of preference as a confession of judgment under the four months' clause; or, in other words, the two sections are about the same in meaning, and therefore, any "transfer" or "gift" of a judgment under six months, with intent to give a preference, is void *per se*. It is the intention of the Bankrupt Act to strike at the root of all preferences obtained by a creditor, when his debtor is insolvent. Bump on Bankruptcy, and many cases cited on page 592.

The intent is the main thing, even if the fraud and preference were after six months. It makes the intent to prefer or give an advantage to one creditor, the important thing, and this may concur with pressure on the part of the creditor. (Bump, 542.)

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The fact that Downey wanted a confession of judgment instead of an open suit, shows clearly that he wanted a preference. Where the bankrupt, being indebted to a creditor on promissory notes due, and to become due, gave a promissory note, payable one day after date, with warrant to confess judgment, and judgment thereon was obtained in November, and execution levied on the bankrupt's goods, before proceedings in bankruptcy, instituted by other creditors in January following, it was held that this act of the bankrupt was an act of bankruptcy, and sought to give a preference. *Fitch et al. v. McGie*, 2 N. B. R., 531.

The judgment creditor claims a preference by reason of execution and levy, but the court says, "An insolvent debtor commits an act of bankruptcy, when he gives any warrant to confess judgment, or procures or suffers his property to be taken on legal process." It does not name any time, in his opinion, making the intention and knowledge of the creditor the guide, even if over six months.

The 35th and 39th Sections of the Bankrupt Act make certain things done acts of bankruptcy *per se*; but from the spirit and intention of the law, acts of fraud, even after the limitations as to time, are acts of bankruptcy.

"When a creditor accepts a security, he is conclusively presumed to know what appears on its face, and to have reasonable cause to believe it was intended to accomplish its ordinary and necessary effect." *Graham, Assignee, v. Stark*, 3 N. B. R., 357, 3 Ben., 520.

The case of *Collins v. Gray*, 4 N. B. R., 631, 8 Blatch., 483, which is the strongest case in favor of the validity of assignments and judgments after four and six months, says, "they are good, if in all other respects the transfer is free from fraud or illegality."

Our next point is this. On the 20th of November, 1873, we filed a petition and exhibits, which clearly bring to the notice of the State court the bankruptcy proceedings officially. And after the demurrer was put in to our petition, the court should have turned the money over to the assignee;

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but instead of making an order, the court files an extended opinion overruling the demurrer, in which the court says: "If then, this money has vested in the assignee in bankruptcy, under the operation of the Bankrupt Law, it would seem to be the duty of this court to direct it to be paid to him instead of the plaintiff."

Now, because of this portion of the opinion filed, the judgment was a judgment on the merits of the case, and not simply a decision overruling the demurrer filed.

"A decision upon a demurrer which has clearly gone to the merits of the case, is an effectual bar to further litigation." *Bigelow on Estoppel*, 121.

"A judgment on general demurrer to the declaration is a judgment on the merits, and is conclusive in a subsequent suit on the same cause of action." *Perkins v. Moore*, 16 Ala., 17.

"A general demurrer to a plea confesses all facts stated in the plea, provided such facts be well pleaded." *Wash. & Balt. Turnpike Co. v. State of Maryland*, 19 Md., 239.

"Where the issue upon general demurrer definitely settles the law of the case against the plaintiff, the issues in fact are not to be tried." *Thompson v. State, use of Adm. of Ford*, 4 Gill., 163.

It is said that equity law would govern this case, because there was a petition and answer filed, and if this is true, Barroll's Chancery Practice, page 114, says: "The right to plead over, where the demurrer is overruled, without withdrawing it, only applies to cases at common law." "Where a case comes before the court on demurrer, all the averments of the bill are to be considered as true." 2 Md., 174; 4 Md., 172.

O. F. Bump, for the appellee.

The demurrer was interposed upon the ground that the court had no jurisdiction to entertain the petition for two reasons:

First. The petition proceeds upon the ground that the plaintiff by the levy obtained a preference, which is void

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under the 35th Section of the Bankrupt Law. The provisions of that section are penal, and the State courts have no jurisdiction to enforce them. *Voorhies v. Frisbie*, 8 N. B. R., 631, 25 Mich., 476; *Brigham v. Clafflin*, 1 N. B. R., 112, 31 Wis., 607; *Gilbert v. Priest*, 8 N. B. R., 159, 65 Barb., 444; s. c., 14 Abb. Pr. (N. S.), 165; *Cook v. Whipple*, 9 N. B. R., 155.

Second. The assignee intervening in a court of law must show a *legal title to the fund*. The money in court never belonged to the bankrupt, and consequently he cannot claim it by mere succession to the debtor's rights. If he claims it by virtue of the 35th Section of the Bankrupt Law, he can only do so by alleging that the sheriff's sale is void. If that sale is void, the money becomes vested in the purchaser at that sale from whom the money came. Consequently the title will not then vest in him. *Lawrence v. Bank*, 35 N. Y., 320; s. c., 3 Robt., 142; *Childs v. Derrick*, 1 Yerger, 79; *Tubb v. Williams*, 7 Humph., 367; *Richards v. Ewing*, 11 Humph., 327; *Jones v. Bryant*, 13 N. H., 53; *Garbutt v. Smith*, 40 Barb., 22.

The statute only gives the assignee the right to recover "*the property, or the value of it, from the person so receiving it,*" not the property, or the proceeds, or the value. The value can only be recovered in a direct action against the preferred creditor. Objections which go to the jurisdiction of the court over the subject matter of the suit may be raised at any stage of the proceedings. *Cutler v. Rae*, 7 How., 729; *Thompson v. Morton*, 2 Ohio St., 26.

When a levy is declared void, the assignee is entitled to the whole of the proceeds without any deduction for expenses. *Street v. Dawson*, 4 N. B. R., 207. No such judgment can be entered in this cause.

Where a case is brought to hearing on petition and answer, all the allegations of the answer must be taken to be true. *Warren v. Twilley*, 10 Md., 39.

In order to render a transfer void, the assignee must prove the following facts :

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1. That the debtor was insolvent. 2. That the transfer was made with a view to give a preference. 3. That the creditor had reasonable cause to believe the debtor to be insolvent; and 4. That the creditor also had reasonable cause to believe that the transfer was in fraud of the provisions of the act. 5. That the transfer was made within four months before the commencement of the proceedings in bankruptcy. *Toof v. Martin*, 13 Wall., 40; s. c., 6 N. B. R., 49; *Scammon v. Cole*, 5 N. B. R., 257; *Forbes v. Howe*, 102 Mass., 427. The answer denies nearly all these material facts. The transfer is valid if the creditor does not know that there are other creditors. *Wadsworth v. Tyler*, 2 N. B. R., 316.

A preference which has stood four months is valid. *Gibson v. Warden*, 14 Wall., 244; *Holl v. Deshler*, 71 Penn., 299; *Hisslop v. Hoover*, 68 N. C., 141; *Bean v. Brookmire*, 1 Dillon, 151.

BARTOL, C. J.—Delivered the opinion of the court.

We fully concur in the ruling of the city court upon the demurrer, and in the reasoning upon which the learned judge rested his decision. In support of these views, we may refer to the decision of the Court of Appeals of New York in *Cook v. Whipple*, 9 N. B. R., 155, as expressing the true ground upon which the rights of an assignee in bankruptcy may be asserted by proceedings in a State court.

It was there held that such assignee "may sue in a State court for the enforcement of any right vested in him by the Bankrupt Act, as for the recovery of property transferred in fraud of that act within six months prior to the commencement of bankrupt proceedings. That the State court in passing upon claims of assignees in bankruptcy, is not proceeding under the Bankrupt Act; but simply recognizes that act as the source of the assignee's title, in the same manner as it would, if he derived his title from a deed or contract."

That this decision was contrary to the ruling of the Supreme Court of Wisconsin in *Brigham v. Clafflin*, 7 N. B. R., 412, and that of the Supreme Court of Michigan in *Voorhies v. Frisbie*, 8 N. B. R., 152. But it is supported by *Ward v.*

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Jenkins, 51 Mass., 583, a case under the former Bankrupt Act ; and by *Stevens v. Mech. S. Bank*, 101 Mass., 109 ; *Forbes v. Howe*, 102 Mass., 427 ; *Hastings v. Fowler*, 2 Ind., 216 ; *Boone v. Hall*, 7 Bush., 66, and *Mays v. Man*, N. Bank, 4 N. B. R., 446 ; 64 Pa., 74.

Both upon reason and authority we think that the decision of the court below was correct, and ought to be affirmed.

After the demurrer was overruled the appellee was permitted to answer the petition, and to file an amended answer, and the cause was submitted upon petition and answer, without any proof being offered.

It is argued by the appellant's attorney, that the appellee, having, by the demurrer, admitted the facts alleged in the petition, was thereby estopped, and that final judgment ought to have been entered for the petitioner ; but the learned counsel is in error. The object of the demurrer was merely to raise the question of jurisdiction, and being overruled, the appellee was entitled to file an answer, and be heard upon the merits,

The petition alleges that one Isaac Lamberd was adjudicated a bankrupt on the 29th day of July, 1873, and the appellant was duly appointed assignee. That on the 27th day of February, 1873, the appellee obtained a judgment against Lamberd by confession. That *feri facias* had been issued thereon, the personal property of Lamberd had been seized and sold by the sheriff, and the sum of seven hundred and ninety-seven dollars and eighty-three cents realized from the sales, which was then in court. The petition charges that the judgment was a fraud upon the Bankrupt Act, because it was confessed at a time when the defendant (Lamberd) was unable in the ordinary course of business to pay his debts, and was hopelessly bankrupt ; and that the appellee knew these facts ; and further, that the confession of judgment was made in contemplation of bankruptcy ; and the petitioner claims the fund in court, realized under the execution, as properly payable to him as assignee.

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The appellee in his answer states that the judgment was obtained on an indebtedness for that sum, due and owing to him from Lamberd; that the same was rendered *more than four months before the proceedings in bankruptcy were commenced.*

“He denies all charges of fraud in obtaining the judgment, denies that Lamberd was, at the time the judgment was rendered, or the levy made, either insolvent or bankrupt, within the respondent’s knowledge; and further denies that at either of those times he had reasonable cause to believe Lamberd to be insolvent; and avers that the judgment was not confessed in contemplation of bankruptcy so far as the respondent has any knowledge; and that the levy was not made with a view to obtain any preference over other creditors, for he did not know that there were any other creditors; and that the judgment was not confessed with any such view by the defendant, Lamberd.”

The answer is verified by oath, and no evidence was introduced to contradict it. It is difficult to see on what ground the appellant’s claim can be maintained in the face of the uncontradicted statements in the answer. It is contended that the confession of judgment was a fraudulent preference and void under the 35th Section of the Bankrupt Law.

That section contains two clauses, the difference between which is very clearly defined by Mr. Justice Swayne in *Gibson v. Warden*, 14 Wall., 244, 299.

We quote from the head-note:

“The two clauses of the 35th Section differ mainly in their application to two different classes of recipients of the bankrupt’s property or means; that is to say, the first clause is limited to a creditor, or person having a claim against the bankrupt, or who is under any liability for him, and who receives money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him, and is under no liability for him.”

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It is obvious that the transaction here assailed, if within the act, must fall within the first clause of the 35th Section, which avoids the prohibited acts "if done within four months before the filing of the petition in bankruptcy," (14 Wall., 248), and to bring the case within this clause it must appear that Lamberd was at the time insolvent, or in contemplation of insolvency, that the judgment was confessed with a view to give a preference to the appellee, *and that the appellee knew*, or had reason to believe that the transaction was in fraud of the statute. 14 Wall., 248.

Now in this case the judgment was confessed more than four months before the proceedings in bankruptcy were begun, and besides, the answer distinctly avers (and there is no proof to the contrary) that the appellee had no knowledge of the insolvency of Lamberd, or any reason to believe that he was insolvent, or in contemplation of bankruptcy.

In this state of facts the court below was right in dismissing the petition. It is well settled that the proceedings by an assignee authorized by the 39th Section must depend upon his rights under the 35th Section. The two sections are to be construed together, as said by Judge Sharswood in *Holl v. Deshler*, 71 Penn., 299. The words in the 39th Section "if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, sold, assigned, or transferred contrary to this act," must be construed so as to be consistent with the 35th Section, namely, provided the petition be filed *within four months* in case of a preference to a creditor, or within six months, in case "of a transfer to a stranger."

The same decision was made in *Collins v. Gray*, 4 N. B. R., 631, 8 Blatch., 483, where are cited to the same effect *Hubbard v. The Allaire Works*, 4 N. B. R., 623, 7 Blatch., 284, and *Bean v. Brookmire*, 4 N. B. R., 196, 1 Dillon, 24.

The order of the City Court in this case will be affirmed, and the cause remanded.

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SUPREME COURT.—CALIFORNIA.

A statement in a complaint that the plaintiff is assignee in bankruptcy, may be treated as surplusage, or at most as *descriptio personæ*.

Under a general averment that the plaintiff was possessed as of his own property, proof may be given that he acquired the title by means of proceedings in bankruptcy.

A complaint need not state how the plaintiff acquired title to the property in controversy.

In suits by an assignee, his representative character need not be averred in the pleadings.

If a duly certified copy of the assignment is put in evidence, it is not necessary to prove all the steps in the proceedings.

A State court may entertain an action by an assignee to recover property disposed of by the bankrupt in fraud of the Bankrupt Law.

CHRISTIAN F. A. DAMBMANN v. *PATRICK J. WHITE* et al.

APPEAL from the District Court, Fourth Judicial District, City and County of San Francisco.

The complaint was as follows :

Christian F. A. Dambmann, plaintiff in this suit, assignee of the estate and effects of Oscar Reinstein and Simon Mamlock, bankrupts under the statute of the United States, complains of Patrick J. White and Henry Breslauer, defendants, and alleges against them as follows :

Heretofore, to wit: On or about the thirty-first day of March, in the year eighteen hundred and sixty-nine, at the City and County of San Francisco, the plaintiff was possessed as of his own property, as such assignee aforesaid, of the following goods and chattels ; to wit, one hundred Marseilles quilts, fifteen hundred pair of men's woolen half hose, forty coats, twenty vests, one thousand merino shirts, one thousand merino drawers, and four thousand yards of linen check, said goods and chattels then and there being of the value of three thousand dollars.

That, on or about the day last aforesaid, at the City of San Francisco, aforesaid, the defendants unlawfully took and disposed of said goods and chattels above mentioned and described, which were then and there of the value of three thousand dollars.

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That on the day and year last aforesaid, at the place aforesaid, the defendants unlawfully took and converted and disposed of said goods to their own use, to the damage of the said plaintiff, as such assignee as aforesaid, of three thousand dollars.

Wherefore, the plaintiff, assignee as aforesaid, prays judgment for three thousand dollars and costs.

The defendants demurred to the complaint, because it did not state facts sufficient to constitute a cause of action, but the demurrer was overruled.

The defendants then answered, denying the allegations of the complaint. On the trial, the counsel for the plaintiff made the following opening statement :

That the property in question in this suit, consisting of five cases of clothes and dry goods, was shipped from New York to San Francisco, on the 1st of October, 1868, by Reinstein & Mamlock, who were then the owners of said goods ; that, on the 21st day of October, 1868, certain proceedings in bankruptcy were taken against Reinstein & Mamlock in the United States District Court for the Southern District of New York ; that under these proceedings Reinstein & Mamlock were declared bankrupts, and that on the 25th day of March, 1869, an assignment of their property was executed under the Bankrupt Law to the plaintiff in this suit. That, on the 7th day of January, 1869, the defendant Breslauer, who had commenced suit in the Fourth District Court against said Reinstein & Mamlock, issued an attachment therein, and placed the same in the hands of the defendant, White, who was then Sheriff of the City and County of San Francisco, with instructions to attach the property in question ; that the defendants thereupon attached said property, then being in the Pacific Mail Steamship Company's office, and the same was subsequently sold under execution in said suit by the defendant, White, and the proceeds of sale, deducting fees and expenses, were paid over to defendant, Breslauer ; that the goods were sold at sheriff's sale, for gold coin, and brought eleven hundred and eleven dollars and fifteen cents.

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Defendant's counsel then objected to the jurisdiction of the court, on the ground that the United States Courts alone had jurisdiction of the subject-matter of the action, as stated by counsel, which was the collection of the assets of the bankrupts, Reinstein & Mamlock. The court overruled the objection, and the defendants, by their counsel, duly excepted. Defendant's counsel then moved the court for a non-suit on plaintiff's opening, on the ground that the complaint contained no allegation as to the bankruptcy of Reinstein & Mamlock, nor averred any facts showing the appointment of plaintiff as their assignee; but was a complaint in trover to recover the value of goods taken from the possession of plaintiff, and as he only claimed to be able to show a constructive possession, arising from his appointment as assignee, and the adjudication of bankruptcy, and these facts were not averred, evidence in support thereof would be inadmissible under the pleadings, and the plaintiff could not recover.

It was admitted by plaintiff's counsel that no actual possession of the goods by the plaintiff could be shown, but, that the title of plaintiff to the goods in question, and their value, arose only by virtue of the proceedings against Reinstein & Mamlock in bankruptcy, and his appointment as assignee.

The court overruled the objection, and denied the motion, and defendant's counsel excepted.

Plaintiff then offered in evidence a certified copy of the record in bankruptcy in the United States District Court for the District of New York, in the matter of O. Reinstein & S. Mamlock, in bankruptcy, showing a petition, filed October 22, 1868, by C. F. A. Dambmann, the plaintiff herein; a deposition of said Dambmann to the act of bankruptcy, and a deposition of said Dambmann to the claim of the petitioning creditor, all of which papers, except the petition, which was dated October 21, 1868, are dated October 22, 1868; an order to show cause why the prayer of said petition should not be granted, dated October 22, 1868, an adjudication in bankruptcy against said Reinstein & Mamlock, dated February 8, 1869. It was recited in said adjudication, that on the re-

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turn of the order to show cause, the said Reinstein & Mamlock appeared, by attorney, and denied the allegations of the petition, and demanded a trial, but subsequently filed their written stipulation, withdrawing their said answer and denial.

Said record, also, contained a certified copy of assignment in bankruptcy, but no order or instrument of any kind evidencing the appointment of said plaintiff as assignee, except the recital contained in the certified copy of the assignment as aforesaid.

Defendants' counsel objected to the introduction of the foregoing evidence; to wit, the certified copy of the proceedings in bankruptcy, on the grounds: 1. That the same was irrelevant, as no averment was made in the complaint of the bankruptcy of said parties, or of the appointment of plaintiff as assignee, but that the action was one by plaintiff in his individual capacity; 2. That the court had overruled the demurrer to the complaint filed in the cause, on the ground that the action was one by the plaintiff, in his individual right, and not in the representative capacity as assignee; and, 3. That the said evidence was not the best evidence to prove the appointment of plaintiff as assignee, but that the same should be proven by a certified copy of the order appointing him said assignee. The court overruled the said objections and admitted the evidence, and defendants' counsel excepted.

Plaintiff then offered in evidence the deposition of F. Mamlock, taken before "the Honorable J. B. Williamson, of Marshall, Harrison County, State of Texas," to whom the commission of this court was issued, in the words as above quoted, but failing to state or show that he was a judge of any court, or an officer authorized by statute to take depositions.

The certificate at the foot of the deposition reads as follows:

"Examination taken, reduced to writing, and by the witness subscribed and sworn this 11th day of July, 1871, before me,

"J. B. WILLIAMSON,
"Judge 6th District, Commissioner."

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Defendants' counsel objected to the reading of this deposition on the following grounds : First. That the commission under which it was taken had been issued without notice to defendants' counsel, as prescribed by law ; Second. That it does not appear to have been issued to a judge or Justice of the Peace, or a Commissioner, as prescribed by law.

It was admitted here that the only notice given by plaintiff of his application for a commission was as follows : That a copy of an order made by the Court Commissioner, dated March 3, 1871, to the effect that the defendant, or his attorney, show cause on the 4th day of March, on the affidavit accompanying said order, and on the papers on file, why an order should not be made that commissions issue to parties to be designated by the court, was served on defendants' attorneys, March 3, 1871. The court overruled the objection, and defendants' counsel excepted.

The court rendered judgment for the plaintiff, and the defendants appealed.

Grey & Brandon, for the appellants.

If it should be contended that the mere description of the plaintiff as assignee, etc., would be equivalent to pleading the Act of Bankruptcy and all necessary proceedings up to his appointment, it certainly could not be held to include the allegation of the execution of the instrument of assignment, which is a subsequent act to be performed by the judge, or in certain cases only, by the Register, and which does not necessarily follow on his appointment. (See U. S. Bankrupt Act, Section 14.) Our Practice Act provides that the facts constituting the cause of action must be stated. The facts necessary to be alleged, and which we were entitled to controvert, and to be prepared to disprove, were : The Act of Bankruptcy ; the adjudication thereof ; the appointment of the plaintiff as assignee by the judge, or, if appointed (as in this case) by the Register, the existence of the facts authorizing the Register to appoint, and his appointment by the Register ; and the assignment to him of the effects of the bankrupt. We were entitled to know the place where,

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and the time when, the assignment was made, to be able understandingly to plead to the averment; for the proceedings might have been had at any time subsequent to the 1st of June, 1867, or in any State from Maine to Texas.

We were entitled to plead the Statute of Limitations, if the action had not been brought within the proper time. We were entitled to know where the proceedings were taken to entitle us to inquire as to their validity.

If the complaint was not an action by plaintiff as assignee in bankruptcy, but was one in his private capacity as an individual (as, indeed, was held by the court, in overruling the demurrer, treating the words assignee, etc., as merely *descriptio personæ*), then the plaintiff should not have been permitted to treat it as an action by himself in his official capacity as assignee. He has availed himself of the former construction made by the court, and cannot now shift his position. The maxims apply: "*Qui tacet consentire videtur*;" and "*Allegans contraria non est audiendus*."

The court erred in denying defendants' motion for a nonsuit. Plaintiff's counsel had admitted in his opening that no actual possession of the goods by the plaintiff could be shown, but that his title thereto, or to their value, arose only by virtue of proceedings in bankruptcy against Reinstein & Mamlock. We submit that the law is, that where one sues in a representative capacity for goods which have never been in his possession, he must plead the facts showing his title. (*Halleck v. Mixer*, 16 Cal., 574; *Barfield v. Price*, 40 Cal., 535.) These cases refer to pleadings by administrators, etc., and an assignee in bankruptcy is, in effect, the administrator of the estate of a living person. (*Wheelock v. Hastings*, 45 Mass., 504.) Where actual possession has existed, it is true there need not be any averment of title, but where only the right of possession exists, as in the case at bar, it must be. (Starkie on Evidence, 1st Am. ed., 1826, by J. Metcalf, Volume III., pp. 1483 and 1484.)

None of these facts necessary to enable plaintiff to recover as assignee having been pleaded, and plaintiff having

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admitted that he could not show any actual possession, the evidence in support of plaintiff's title in his representative character was inadmissible, and a motion for a non-suit on the opening should have been granted.

On the grounds above stated the court erred in admitting the copies of the proceedings in bankruptcy. These were entirely irrelevant in any action based only on the title of the plaintiff in his private capacity, or on his actual possession; but even construing the pleading as containing an averment of all proceedings up to, and including his appointment as assignee, then the copy of the assignment certainly should not have been admitted, for there was no averment of any assignment, which, as we have seen, under Section 14 of the U. S. Bankruptcy Law, is a separate and subsequent act to be performed, and therefore a separate fact to be alleged. This section provides also that the copy of the assignment shall be conclusive evidence of the assignee's title. Evidence of what? It can only be made evidence of some fact, or facts, which it was necessary to plead, and which might be put in issue; and those facts would be the adjudication of bankruptcy, the appointment of plaintiff as assignee, his qualification, the assignment by the proper officer—in other words, his title.

Have the State courts jurisdiction of actions by an assignee in bankruptcy to collect the assets of the bankrupt? There have been numerous decisions in other States, as in the United States, on both sides of the question, but the question on this express point is a new one in this State; and this court, whatever its decision may be, will have to disregard some decisions heretofore made. We have used the expression "express" point, because, as we shall hereafter show, the question has been settled by this court on two occasions, upon a precisely analogous one. The decisions up to the submission of this cause would seem to have been mostly to the effect that State courts had jurisdiction in the cases stated, but since the submission the well-considered cases cited in our petition for rehearing came to hand, to which we again

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invite the attention of the court. They are: *Voorheis, Assignee, v. Frisbie & Morrow*, 8 N. B. R., 152; s. c., 25 Mich., 476, from which we extract the following: "These cases hold that the State courts have not jurisdiction." See also *Shearman v. Bingham et al.*, 7 N. B. R., 490; s. c., 5 N. B. R., 34; *Martin v. Hunter*, 1 Wheat., 304; *McLean v. Lafayette Bank*, 3 McLean, 503; *Stearns v. United States*, 2 Paine, 300; *Brigham v. Claflin*, 7 N. B. R., 412; s. c., 31 Wis., 207.

Two contrary decisions have also appeared; viz.: *Gilbert v. Priest*, 8 N. B. R., 159; s. c., 63 Barb., 339; *Payson v. Dietz*, 8 N. B. R., 193; s. c., 2 Dillon, 504. The former, however, is not the decision of an appellate court; and in the latter, the question of the jurisdiction of State courts is not involved, but the court assumes it, and as mere *obiter* limits the jurisdiction of State courts to cases where the assignee resorts to them with consent of the Bankruptcy Court. And both seem to be based on the fact that Congress has not in terms given exclusive jurisdiction to the U. S. Courts; the learned judges seeming to have overlooked the point that Congress has no power either to give to, or take away from the State courts jurisdiction in any way (*Ex parte Knowles*, 5 Cal., 300); and not to have realized that "exclusive jurisdiction necessarily attends exclusive legislation." (*United States v. Ames*, 1 Wood. & M., 76; *United States v. Cornell*, 2 Mason, 60; *United States v. Bailey*, 9 Peters, 238.)

Doyle & Barber, for the respondent.

The complaint is sufficient. If the averments as to plaintiff's assigneeship are omitted as surplusage, the complaint, as a pleading, is good. Treating those averments as material, the complaint is equally good. (See Forms, 2 Chitty's Pl., 33, 838, 839, 840; 1 Abbott's Forms, edition of 1871, p. 131, Form 174; *Hastings v. Fowler*, 2 Ind., 216.) Whether the plaintiff sued individually or as assignee, the evidence given by him proved his case in either aspect. He proved the legal title in himself by proving property in his assignors, and an assignment from them, and by this evidence he also satisfied all the allegations of the complaint in respect to his

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representative character. (See Willes' R., 104, note A ; 1 Chitty's Pl., 68, 69, note 3 ; *Valentine v. Jackson*, 9 Wend., 302 ; *Evans v. Moore*, 2 Cowp, 569 ; Bankrupt Act, Section 14.)

It may admit of question whether, when a right of property is created by the laws of the United States, Congress has the power to prohibit the holder of such title from claiming under it any relief which a State court, in the exercise of its ordinary powers, would be able to give him, if he had acquired title from any other legal source.

But it is unnecessary to pursue this inquiry, as Congress has not conferred upon the Federal courts exclusive jurisdiction of such suits as the present. (Story on the Constitution, Sections 1752, 1753, 1754.)

The jurisdiction of a State court of law over an action of trover, is a part of the primitive common law jurisdiction of such court, and is not ousted by reason of a grant of a similar jurisdiction to the Federal courts, in places where the plaintiff's title is derived through an Act of Congress.

In cases where there is no exclusive grant of jurisdiction to the Federal courts, if the State tribunals are so organized as to afford redress, it may be obtained therein. (*Teall v. Felton*, 1 Coms., 537 ; see also 1 Kent, 90, 397, and note ; *Ward v. Jenkins*, 51 Mass., 584 ; *Hastings v. Fowler*, 2 Ind., 216 ; *Pindell v. Vimont*, 14 B. Mon., 400.)

The very first case cited by the appellant (*Voorheis v. Frisbie*, 8 N. B. R., 152), admits that, in a case such as the present, the State courts have jurisdiction. *Payson v. Dietz* (8 N. B. R., 193), expressly concedes such jurisdiction in the State courts. *Shearman v. Bingham* (5 N. B. R., 34), admits the jurisdiction of the State courts. It appears, from the opinion in the case on appeal, that the larger part of the suits arising in Massachusetts on bankruptcy titles, are brought in the State courts (7 N. B. R., 497), and the jurisdiction of the State courts is conceded by the appellate tribunal. In *Gilbert v. Priest* (8 N. B. R., 159, 63 Barb., 339), the direct question was presented, whether the State court had jurisdiction of a suit by the assignee in bankruptcy

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to set aside a conveyance executed in favor of the provisions of the Bankrupt Law. After an attentive examination of the question, the court decided in favor of the jurisdiction. *Peiper v. Harmer* (5 N. B. R., 252), maintains that State courts have jurisdiction of an action by the assignee on a cause which accrued to the bankrupt. (*In re Central Bank*, 6 N. B. R., 207.) Injunction applied for to restrain assignee from bringing suit in State court, to recover from a creditor the amount of a preferred debt paid in violation of the Bankrupt Law, on the ground that such court had no jurisdiction. Denied, on the ground that the court "never supposed the effect of the Bankrupt Act to be to oust the jurisdiction of the State courts."

It has been decided in several cases that suits by the assignee cannot be brought in any other Federal court than that having jurisdiction in the district where the proceedings in bankruptcy were commenced. (*Payson v. Dietz*, 8 N. B. R., 193; *Shearman v. Bingham*, 5 N. B. R., 34; *Jobbins v. Montagu*, 6 N. B. R., 509; *Paine v. Caldwell*, 6 N. B. R., 558; *in re Richardson*, 2 N. B. R., 202; *Markson v. Heaney*, 4 N. B. R., 510.) It is true that decisions may be found, asserting that, in such case, any United States District Court has jurisdiction; but the weight of authority is decidedly the other way.

No doubt a State court would have jurisdiction of an action of trover brought by a foreign assignee in bankruptcy (*Bird v. Caritat*, 2 J. Johns., 341; *Milne v. Moreton*, 6 Bin., 353; *Goodwin v. Jones*, 3 Mass., 513), although the foreign Bankruptcy Court might have exclusive jurisdiction of all proceedings in respect to the fiat in bankruptcy, the discovery and distribution of the bankrupt's assets, and the operation of the law on the bankrupt personally.

So of an action brought by an assignee, deriving title through the insolvent law of a sister State, which provides that a certain court in that State should have exclusive jurisdiction in all matters of insolvency. It would be a strange anomaly to concede such jurisdiction in the case of foreign

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assignees, and deny it in the case of an assignee appointed under the Act of Congress.

CROCKETT, J.—The demurrer to the complaint was properly overruled. The statement in the complaint that the plaintiff is assignee in bankruptcy of Reinstein & Mamlock, may be treated as surplusage, or at most as *descriptio personæ*, and may be disregarded without impairing the sufficiency of the complaint. Nor did the court err in denying the motion for a non-suit on the plaintiff's opening statement. Under the general averment in the complaint, that "the plaintiff was possessed as of his own property" of the goods and chattels enumerated, he was entitled to show, by proof, that he had acquired the title by means of the proceedings in bankruptcy. These were probative facts, not necessary to be averred in the complaint. The ultimate fact to be proved, and which was averred, was that the title was in the plaintiff, and it was unnecessary to state in the complaint how he acquired it.

In suits by, or against executors or administrators, their representative character must be averred in pleading, as was held in *Halleck v. Mixer* (16 Cal., 574), and *Barfield v. Price* (40 Cal., 535), for their right to sue and be sued, results by operation of law from the relation which they occupy toward the estate; and this relation must be averred, and proved if denied. But in proceedings in bankruptcy, the legal title vests in the assignee under the assignment. Whatever right the bankrupt had is assigned to and vests in the assignee, who thereby becomes, for the purpose of maintaining or defending suits, "possessed as of his own property" of the estate assigned to him. It is true he holds the title, and the property, when recovered, in trust for certain purposes specified in the statute. But as between him and a stranger he holds the title, and may assert it in the same form of action as though he owned the fee. This view of the law disposes also of the objection to the introduction in evidence of the proceedings in bankruptcy. If it was unnecessary to set them out in the complaint, it was,

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of course, competent to prove them without the averment. Nor was it necessary to prove all the steps in the proceeding, inasmuch as Section 14 of the Bankrupt Law provides that a copy of the assignment shall be conclusive evidence of the assignee's title, and in this case a copy of the assignment was put in evidence.

The objections made to the depositions offered by the plaintiff are untenable.

Section 517 of the Practice Act authorizes the court to shorten the time whenever "a written notice of a motion is necessary;" and under Section 433 a written notice is necessary of an application for a commission to take the deposition of a witness in another State. The order to show cause, and the issuing of the commission, were equivalent to an order shortening the time, and dispensed with the necessity of any other or further notice. The objection that it does not appear on the face of the commission, that the person to whom it was addressed was a Judge or Justice of the Peace, is frivolous.

The presumption is, that on granting the commission, the court, or officer who ordered it, performed his duty, and directed it to a person who was qualified to execute it. Furthermore, the return to the commission shows that the person to whom it was directed, and who executed it, was a District Judge.

We deem it unnecessary to notice the other points discussed by counsel.

Judgment affirmed.

Mr. Chief Justice Wallace did not express an opinion.

The foregoing opinion was delivered at the April term, 1873, and a rehearing having been granted, the following opinion was delivered at the July term, 1874.

CROCKETT, J.—The argument on the rehearing has not convinced us that our former opinion ought to be modified. But the point is now made for the first time on the appeal, that a State court had no jurisdiction of the action, and that

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the plaintiff's remedy was by some appropriate proceeding in the United States District Court. The authorities are not uniform on the question whether an assignee in bankruptcy can maintain an action in a State court to recover property disposed of by the bankrupt, in fraud of the Bankrupt Law. But we think the weight of authority, and supported by the better reasoning, maintains the jurisdiction of the State courts in that class of cases, when the nature of the action is such that the proper relief can be administered in that forum. In this case the action is trover in the usual form, and the judgment is for damages. The court was competent to afford the necessary relief in an action of that nature, and properly entertained jurisdiction of the cause.

We deem it unnecessary to review the authorities on this point, but the question was expressly decided and the authorities collated, in the recent case of *Gilbert v. Priest*, 8 N. B. R., 159, 63 Barb., 339. The reasoning in that case, in support of the jurisdiction of the State courts, appears to us not only to be conclusive, but to be in consonance with the weight of authority.

Judgment and order affirmed. Remittitur forthwith. Mr. Justice McKinstry did not express an opinion.

UNITED STATES CIRCUIT COURT.—E. D. PENNSYLVANIA.

A partnership is not entitled to retain, towards the payment of its debt, the surplus arising from the securities held by one partner for his debt.

Where a creditor has a general lien, and the debtor, on receiving an advance or other accommodation from such creditor, deposits with him a particular security, specially intended, or appropriated, or even pledged to meet such advance, or to cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's general lien.

If two mercantile houses are composed wholly of the same persons they constitute, notwithstanding the difference in their names of association, one and the same joint party creditor, and if the creditors are entitled to a general lien and there is a deficiency in value of the securities deposited

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with either house, an ulterior general lien does not attach to any surplus in value of the securities deposited with the other house, except under special circumstances.

The difference in names implies an intended separation of possession and control, and in order to establish an ulterior general lien in favor of either house, it is only necessary to rebut this implication.

If the debtor knows that the two houses are composed of the same persons, and the declarations or acts of the parties pending the business, indicate a belief on each side that either house may control the securities deposited with the other house, there is a general ulterior lien, in favor of either, upon any surplus in the hands of the other.

A creditor who is vested with authority to sell securities deposited with him, cannot exercise it otherwise than under a trust for the debtor's benefit.

A creditor who holds stocks as collaterals, need not sell them by auction, but may sell them at the stock exchange or brokers' board.

If the debtor, though insolvent, acquiesces in a sale of stocks by a secured creditor, his assignee is bound by such acquiescence, although the stocks are sacrificed.

The assignee is not bound by the bankrupt's ratification or acquiescence in a sale of collaterals made after the commencement of the proceedings in bankruptcy.

An assignment, though voidable at the suit of the assignee, is not void.

JOHN SPARHAWK et al. v. FRANCIS A. DREXEL et al.

CHARLES T. YERKES, JR., traded as C. T. Yerkes, Jr., & Co. While thus engaged in business, he obtained a loan from S. & W. Welsh, and deposited with them certain stocks and other property as collateral security. On October 17th, 1871, Drexel & Co. purchased the claim of S. & W. Welsh, and received the securities. Drexel & Co. sold the securities and realized enough to pay the debt and leave a balance of eight hundred and seventeen dollars and ninety-eight cents. Out of this balance they retained sixty dollars and forty-three cents, on account of a debt due by C. T. Yerkes, Jr., & Co. to them.

Francis A. Drexel, Anthony J. Drexel, J. Pierpont Morgan, Joseph W. Drexel, J. N. Robinson, and J. H. Wright, were engaged as partners in the business of bankers and brokers under the firm name of Drexel & Co., in the city of Philadelphia, and under that of Drexel, Morgan & Co. in the city of New York. C. T. Yerkes, Jr., & Co. obtained loans from F. A. and A. J. Drexel, the senior members of these two mercantile houses, and deposited certain collaterals with them to secure

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the same. On a sale of these collaterals enough money was realized to pay these loans and leave a balance, which was retained by Drexel & Co. on account of a debt due them by C. T. Yerkes, Jr., & Co.

C. T. Yerkes, Jr., & Co. also obtained loans from Drexel & Co. and Drexel, Morgan & Co., and deposited securities with each house to secure their respective loans. The collaterals for these loans were deposited with those in charge of the business of Drexel & Co.

C. T. Yerkes, Jr., & Co. failed on the 16th day of October, 1871, and was then indebted to the various parties collectively in the sum of..... \$945,052.76
this sum being inclusive of interest to the 17th of October, 1871. A portion of this sum (inclusive of interest as aforesaid)..... 186,199.17
being the claim for moneys loaned by S. & W. Welsh, which was on the 17th day of October, 1871, purchased by Drexel & Co.

The remaining portion of the first mentioned sum, except the sum of..... 2,075.00
consisted of balances of moneys which had been originally loaned by Drexel & Co., in the city of Philadelphia, amounting to the sum (inclusive of interest to October 17th) of..... 50,691.39
and by Drexel, Morgan & Co., in the city of New York, amounting to the sum (inclusive of interest as aforesaid) of..... 610,691.36
and by F. A. & A. J. Drexel, amounting to the sum (inclusive of interest as aforesaid) of..... 95,395.84

The loans by Drexel & Co. and Drexel, Morgan & Co. were demand loans; that by F. A. & A. J. Drexel was payable in sixty days from September 22d, 1871.

All of these loans, as before stated, were secured by pledges of various stocks and other securities. The value of those pledged for the loan originally made by S. & W. Welsh, was in excess of the amount of the sum due.

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The value of the securities (as estimated by the subsequent sales made) originally pledged for the loan by Drexel & Co. (of which the sum of \$ 50,691.39 remained due at the time of the bankrupt's failure) in the possession of Drexel & Co. at said time, exceeded the said sum by the amount of about 55,687.73

The value of the securities (according to the same estimate) remaining of those originally pledged for the loan by Drexel, Morgan & Co. (of which the sum of 610,691.36 was due), was at said time less than said sum by about the sum of 57,205.04

The value of the securities (according to the same estimate) remaining of those originally pledged for the loan by F. A. & A. J. Drexel (of which the sum of 95,395.84 was due), at said time exceeded said sum by about the sum of 12,297.18

On the 17th of October, 1871, C. T. Yerkes, Jr., & Co. executed the following paper, to wit :

PHILADELPHIA, October 17th, 1871.

Drexel & Co., Drexel, Morgan & Co.,

GENTLEMEN :—You are hereby authorized to sell, at public or private sale, for cash or on credit, all stocks, bonds, and other securities you may hold which belong to me, or in which I am interested, and apply the proceeds to the payment and satisfaction of the claim you hold against me. This is to apply to the amounts heretofore advanced or loaned to me, and also to such claims against me as you may purchase. Until sold, you will hold the securities as collateral.

C. T. YERKES, JR., & Co.

On the 18th day of October, 1871, another paper was executed by C. T. Yerkes, Jr., & Co., which was as follows :

C. T. Yerkes, Jr., & Co. in account current with Drexel &

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Co., for account of Drexel & Co., Drexel, Morgan & Co., and F. A. and A. J. Drexel.

Please examine and report on this account as soon as convenient.

Dr.	Cr.
To amount due Drexel, Morgan & Co.....\$505,802 19	BY COLLATERALS:—
To amount due F. A. and A. J. Drexel..... 95,000 00.	277 shares Green and Coates Streets Railroad stock.
To amount due Drexel & Co..... 186,200 00.	299 shares Camden and Amboy Railroad stock.
	100 shares New York Central and Hudson Railroad stock.
	5,000 shares Philadelphia and Erie Railroad stock.
	7,600 shares Lehigh Navigation Company stock.
	1,521 shares Pennsylvania Railroad stock.
	\$3,500 United States 5-20 bonds.
	\$1,000 Oil Creek and Allegheny Railroad bond.
	\$8,000 St. Louis city gold loan.
	\$32,050 State of Pennsylvania six per cent. loan (15-25).
	\$21,000 Philadelphia and Erie Rail- road seven per cent. bonds.
	\$271,900 Philadelphia city six per cent. loan.

WHEREAS, Charles T. Yerkes, Jr., & Co. have heretofore borrowed from Drexel & Co., Drexel, Morgan & Co., and F. A. and A. J. Drexel, various sums of money, at various times, and deposited with them various stocks, bonds, and other securities as collateral therefor, with the understanding and agreement that such stocks, bonds, and other securities should be held and appropriated as collateral security to and for the amounts due upon any and all of said accounts; and

WHEREAS, There are now due to said several parties, on account of such loans and dealings, the sums above mentioned, and they hold the stocks, bonds, and other securities above set out, under the agreement and understanding above men-

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tioned, and they desire further authority to sell and dispose of the same ;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH, That said Drexel & Co., Drexel, Morgan & Co., and F. A. and A. J. Drexel are hereby authorized to sell and dispose of the stocks, bonds, and other securities held by them, as above set out, at public or private sale, for cash or on credit, and for such prices as they can obtain therefor, and apply the proceeds, when and as realized, to the payment of above loans and advances, according to the agreement and understanding above set out.

C. T. YERKES, JR., & Co.

On the 23d day of October, 1871, Charles T. Yerkes, Jr., made a general assignment for the benefit of his creditors. On the 10th day of November, 1871, proceedings in bankruptcy were instituted against Charles T. Yerkes, Jr., trading as C. T. Yerkes, Jr., & Co., wherein he was adjudged bankrupt on the 13th day of December, 1871; and John Sparhawk, George J. Gross, and J. Davis Duffield were appointed assignees on the 23d day of January, 1872. The assignees thereupon filed a bill in equity against S. & W. Welsh, F. A. & A. J. Drexel, Drexel & Co., and Drexel, Morgan & Co., for an account. The respondents answered, testimony was taken, and the matter referred to a Master. The Master made a report, to which the following exceptions were filed, to wit:

Exceptions on behalf of defendants to the Report of the Master.

First. The Master erred in finding that the defendants were not entitled to apply the securities originally pledged to secure the loan by F. A. and A. J. Drexel, to the indebtedness due to Drexel & Co.

Second. The Master erred in not finding that all the collaterals were held as a common security to all the loans.

Third. The Master erred in reporting that F. A. and A. J. Drexel should account for the surplus of the proceeds of the securities pledged for the loan by them to the bankrupt, viz.: for \$4,994.14, with interest from November 19th, 1871.

Exceptions of plaintiffs to the Report of the Master.

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First. The Master has erred in reporting that there was any merger of the securities of the loans made by "Drexel, Morgan & Co.," and "Drexel & Co."

Second. The Master has erred in not stating an account of the securities pledged for each loan separately; and in not requiring the defendants to account therefor separately.

Third. The Master has erred in holding that the defendants had any right to sell the securities pledged to them by S. & W. Welsh, in any other way than at public sale by auction, after due notice.

Fourth. The Master has erred in holding that the defendants had any right to sell the securities, pledged to "F. A. and A. J. Drexel," "Drexel, Morgan & Co." and "Drexel & Co.," in any other way than at public sale by auction, after due notice.

Fifth. The Master has erred in not charging the defendants with the highest market price the securities pledged have reached since the illegal sales thereof by the defendants.

Sixth. The Master has erred in holding that the defendants had any right to sell the securities pledged, without notice of the time and place of sale to C. T. Yerkes or his assignee.

Seventh. The Master has erred in holding that the defendants had any right to buy the debt due "S. & W. Welsh," and to sell the securities pledged therefor, in the manner they did.

Eighth. The Master has erred in not charging the defendants with the sum of \$60.43, realized from the sale of the securities pledged for the loan made of "S. & W. Welsh" and not paid over to the plaintiffs.

After the exceptions were filed, the Master made a supplemental Report, stating that his attention had not been called to the fact that the sum of \$60.43 had been retained by Drexel & Co., and recommending that they should be directed to pay that sum to the assignees with interest from November 18, 1871. All the other facts material to this case, will be found in the opinion of the court.

Saml. Dickson and *J. C. Bullitt* for defendants, and *Geo. Junkin*, for complainants.

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CADWALADER, J.—The right of the complainants to the surplus values of the securities transferred by the defendants, S. & W. Welsh, to the other defendants, beyond the whole amount advanced by Messrs. Welsh to the bankrupt, has not been disputed. The other subjects of the bill have been the only matters in controversy.

The two so-called houses of Drexel & Co., at Philadelphia, and Drexel, Morgan & Co., at New York, were composed each of the same six persons. They are here defendants. The bankrupt had certain transactions of distinct business with two only of these persons, namely, F. A. and A. J. Drexel. From these two he received advances, which were more than covered by deposits of distinct specific securities. The other defendants were not, in any wise, interested in these particular securities. Nevertheless, the surplus of their proceeds, after payment of the specific advances upon them, appears to have been received and retained by the six defendants. I concur with the Master in opinion that they are accountable for such surplus to the complainants. I do not think that the result could, in this respect, have been changed by anything short of a positive appropriation by the bankrupt, or an agreement of equivalent effect. I believe that the defendants acquiesce in this conclusion.

The subjects of the principal contention are other securities which were deposited by the bankrupt with the defendants' New York and Philadelphia houses respectively, to cover several specific advances of large amounts of money made from time to time to him by each house.

The relation of the defendants to this debtor was not, at either place, that of brokers. Their principal relation, at each place, was that of his bankers. But they were not simply his bankers. The relation of banker was combined with a relation which was, in a certain legal sense, analogous to that of a factor. Independently, however, of the writings of 17th and 18th October, 1871, which will be separately considered hereafter, this analogy was a qualified one.

The general relation of a *simple* banker to his customer,

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differs from that of a factor to his principal. Chief Baron Pollock, when at the bar, said in argument, that a banker is a factor for money (2 B. & C., 425); but one of the judges to whom the argument was addressed, said only that as to a depositor's ownership of bills remaining in the hands of his banker, the case of customer and banker *resembled* that of principal and factor; meaning to suggest that the resemblance was not identity—*Nullum simile est idem*. Another judge said, on the same question, of the property continuing in the customer, that bankers receive bills, as factors or agents, to obtain payment of them when due. The completeness or general truth of the analogy to a factor was afterwards denied in the House of Lords. (2 H. L., 28, 36, 37, 43, 44.) In an intervening case, bankers were judicially described by Parke, B., as "money factors" (6 M. & G., 655), but by Lord Denham, C. J., as "a *species* of factors in pecuniary transactions." (*Ib.*, 666.) These last expressions were used with reference to a banker's general lien. But the analogy is, in even this limited respect, an imperfect if not a false one.

The existence of a factor's general lien has been established for one hundred and twenty years, and the existence of a banker's for eighty years. They are each privileged creditors; but a factor's general lien is more extended than a banker's.

The factor has, for his advances and outstanding liabilities accrued, and also for those accruing but not yet matured, a lien upon even the cash balances, which would otherwise be due and payable to his principal. A banker has no such lien upon the cash balances, which are, from time to time, to the credit of his customer. They can be drawn out for the customer's current use, upon his checks or other orders, though he may be under outstanding immature liabilities to the banker.

The difference is, in this case, unimportant, because, upon *securities* on hand, not converted into actual cash, which alone were here in question, there is no distinction between the lien

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of a factor and that of a banker. Each has a *general* lien upon all such securities while they are in his possession.

Authorities in the United States and in England which recognize or establish a banker's general lien, are: 1 Howard, 234, 239; 6 Howard, 212, 229; 1 Wallace, 166; 1 Esp., 67; 5 D. & E., 491; 15 East, 428; Ryan & M., 271; 12 Cl. & Fin., 805, 806, 810; s. c. in H. L., 3 Com. B., 531, 532, 535. And in Exch. Ch., 660, 664, 665, 666; Law Rep., 8 Chanc., 41; Law Rep., 17 Eq., 235, 236.

Where a creditor is in a privileged relation, which thus gives him a general lien, and the debtor, on receiving an advance or other accommodation from such creditor, deposits with him a particular security, specially intended or appropriated, or even pledged to meet such advance, or to cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's *general lien*. This general lien is a right of retention, which attaches at once, and becomes ultimately available for his benefit, if there is a surplus of the value of the particular security and such surplus is needed in order to cover any deficiencies.

If each of the defendants' houses were considered here as a distinct joint party creditor, the lien of each house would thus have been a general one upon all securities deposited by the debtor, with such house. That the defendants had, at each of the two places at which they conducted their business, a general lien to this extent, is unquestionable. The questions to be considered are not as to a general lien of so simple a kind.

The first question will be, whether for any deficiency in value of the securities deposited with either house, an *ulterior* general lien attached to any surplus in value of the securities deposited with the other house.

Composed, as these two houses were, wholly of the same persons, they constituted, notwithstanding the difference in their names of association, one and the same joint party creditor of the bankrupt, or debtor to him. Their accounts with

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him could, at any time, have been consolidated, in order to ascertain the general balance of all his transactions with them, in both names ; and the final balance of all accounts, whether against him, or in his favor, could have been sued for in a single action.

These propositions do not suffice to establish the existence of the indiscriminate ulterior general lien, which is now in question. To assume that such a lien upon all the securities, as a common fund, must necessarily attach, as a consequence of the consolidated right of action, would be a mere begging of the question. But the propositions may elucidate it.

Lord Kenyon, the judge who first recognized the general lien of a banker, said that it existed by the general law of the land, unless there was evidence to show that the banker had received any particular security, under special circumstances, which would take it out of the general rule. (5 D. & E., 491.)

From the case of *Brandao v. Barnett*, if the judgment of the court of Exchequer Chamber (6 M. & G., 630), and the judgment of reversal in the House of Lords (3 Com. B., 519; 12 Cl. & F., 787), are compared with each other and with *Leese v. Martin*, (Law Rep., 17 Eq., 224,) it will appear that the special circumstances which will prevent the attaching of the general lien, must be such as are *incompatible* with its *intended* existence or continuance.

Here it may be observed that if the name of the two houses had, in each place, been the same, the mere fact that two or more distinct accounts, differently described or entitled, were kept by them with this customer, would not have prevented the ulterior general lien from attaching. The accounts might, at any time, have been consolidated for the purposes of such ulterior lien. Indeed, the lien would have attached without any actual written consolidation of accounts. The separation of the accounts could have no more operation to the contrary than a specific appropriation of a certain security to meet a particular advance, which is the ordinary case

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of the general lien attaching to any surplus. The reason is, indeed, stronger than in such ordinary case. The balance of one account being against the defendants, and the balance of the other being in their favor to a greater amount, the general lien would have secured the excess of the latter balance above the former one.

In the case of the European Bank, the judges of the English Court of Chancery Appeals were of opinion that, "as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account." In that case, a debtor bank had three accounts with a creditor bank, which were kept by the latter bank; namely, a loan account, a discount account, and a general account; and was in the habit of receiving, from the creditor bank, accommodation loans, which were entered in the loan account, and of transmitting securities, by way of deposits, to meet these loans. In the course of these transactions, the debtor bank thus transmitted three bills of exchange to the creditor bank in a letter, stating that they proposed to draw upon the latter bank for a greater amount, but that, as their credit would not afford a margin to that extent, they sent the three bills as a collateral security. The drafts for the larger amount were paid by the creditor bank, and the payments charged to the loan account. The avails of the three bills were more than sufficient to cover this loan account; but there was a deficiency, which remained due, on the general account. The decision was that, for this deficiency, the creditor bank had a lien upon the three bills, so far as they were not required to cover any balance of the loan account, though securities thus deposited had never before been applied, as between the two banks, to any balance or accruing liability in either of the other accounts. (Law Rep., 8 Ch., 41.)

But, in the present case, the difference was not thus merely in the heading or title of two accounts kept by a

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banking-house with an indebted customer. The difference was also in the names, under which the defendants carried on their own business at the different places, and in which the respective accounts with him were kept, and the several securities were originally deposited and received. Did this additional difference exclude the ulterior general lien?

Independently of special circumstances, which are to be considered hereafter, I would have thought that it did.

It is true that such a private association as an unincorporated banking-house, or a commercial firm, is incapable of any artificial aggregate existence, independent of the natural personality of the members. Their internal and external relations, in this respect, cannot be conventionally modified where any question of continuing succession is involved, or any question of a right of action, or of any established form or mode of judicial procedure. But where no such question, either of representative existence or of judicial personality, is involved, the *internal* and *external* relations of the association may, within certain limits, be so determined *conventionally* as to *resemble* those which might be contracted by an artificial aggregate person, such as a corporate body. As to the internal concerns of a partnership, we know that their books ordinarily contain debits and credits to each member in account with his firm, in the same form as if he were the stockholder of a corporation; and cases have occurred in which such entries, and those of a different kind, have been judicially contrasted in determining the question whether a debt is joint or several. As to *external* relations, the illustration is more simple. The business may be conducted at different places in the distinct names of two or more branches or firms, which are *nominally different*, though, in fact, composed, as in the present case, of the same persons. Now, with reference to such *nominally different* personalities, *liens* may, conformably to the laws of *property*, be *conventionally* created or extended, excluded or restricted. And this may be done either expressly or by implication.

In considering the effect of the difference in the names, it

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may be observed that no lien can exist in favor of a creditor who has not possession of the subject. It is true that a controlling power is in effect possession, and that the requisite control might conventionally have been given, notwithstanding the difference in the names of the two houses. But this difference in their names might well be understood as implying, unless otherwise explained, an *intended* separation of possession and control. This would exclude the ulterior lien in question. If an association, composed of the same persons, carries on business in Asia, America, Europe, and Africa, under four different names, the intended separation might, perhaps, in many cases, be almost a simple inference of common sense.

On this point I may have overlooked some authority which ought to have been mentioned. In some cases which I have read there might be a supposed analogy; but it fails of applicability to the question. In *Haile v. Smith* (1 Bos. & Pul., 563,) the existence of such an ulterior lien was not suggested; but there was an express appropriation, which made the question immaterial. The appropriation would not have been thought necessary if the lien existed. But I have not attributed to the case any bearing upon the question.

The rule upon the subject should be sufficiently uniform to be adaptable to the probable cases of most frequent occurrence; and where the names at different places differ, a shifting lien, transposable from one place to the other, could not ordinarily be sustained without practical inconvenience. To avoid injurious uncertainty, the safer rule would seem to be, that even where the same persons conduct their business in the same town under different names, an intended exclusion of the ulterior general lien is ordinarily implied.

Therefore, independently of the special circumstances, I would be of opinion that the defendants had no lien upon a surplus in the hands of one of their houses to cover any deficiency in the securities deposited with their other house.

The great fire of the 8th and 9th of October, 1871, at Chicago, caused a sudden depression of the market or nomi-

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nal value of the securities. The bankrupt, on the 16th of that month, failed in his business, which had been that of a banker and stock and exchange broker. The securities in question were such as he had been in the habit of buying and selling as a broker, and as a speculator on his own account.

Until after the fire, no special circumstances had occurred in any wise changing the general aspect of the legal question above stated. The business had theretofore been conducted very loosely on the part of the defendants, but without any apparent irregularity on the part of the bankrupt. The defendants had kept no accounts with him which were entered in their books at either New York or Philadelphia. They had only memoranda of the loans on slips of paper accompanying the securities. The specific securities were, until then, kept separately by, or for, the respective houses. In the bankrupt's books there was always a formal separate account of each house with him, and appended was always a list of the securities. This list was kept by him in such a manner as to indicate the securities which each house had originally received, and what securities were, at any given time, on deposit with them respectively.

The occurrences in the week next following the fire were important. On the 10th of October, 1871, or perhaps a day or two later, the defendants made a verbal demand upon this debtor to pay off their loans to him as fast as he possibly could. He assented or submitted. They appear to have been willing that, in order to raise the money, he should himself sell the collateral securities which they held. This demand was made at Philadelphia, by two of the defendants, on behalf either of both houses or of their New York house. One of the defendants testifies that the call for payment was more positive, but that on the result of the interview the positive call was withdrawn. Being pressed to give the language used, he answered, "The language it is impossible for me to recollect further than one point * * * * in regard to Drexel, Morgan & Co.'s loan. Upon referring him [the

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debtor] to them for renewal, his reply was, 'There is no need, it is all one concern, and you can fix it as well as they.' That, to my recollection, is about the words used, and we arranged it accordingly, without reference to them. * * * * That is about as much as I can recollect of the actual words, except the agreement to continue the loan. That is not part of the words. * * * * There was no change made in the entries, but the collaterals were consolidated." Being asked to explain this expression, he added:—"Previous to that time, the line of distinction had been attempted, in keeping collaterals of Drexel & Co. and Drexel, Morgan & Co.,—that is to say, though in the same receptacle, they were kept separate, probably by a band. Afterwards there was no separation." Recurring to the interview, he said, "I merely continued the loan; extended the time of its payment by making it on demand," and said further, that this was done without any reference whatever to Drexel, Morgan & Co. by Drexel & Co. Another of the defendants and the debtor, concurred in attributing to what passed in the same interview, the effect, as between the defendants' two houses, of an assumption by the Philadelphia house of a responsibility to the New York house for the whole amount of the loans; and the debtor assumed in his testimony, that the business thereafter was between him and the Philadelphia house alone. But this was a mere arbitrary version; and the assumption was unsupported by any written or oral proof. The debtor's testimony on this point, where not indistinct, is, like that of the defendants, merely argumentative. He and they, by constantly introducing alleged mental understandings and asserted usages, have so confused and obscured their testimony, that, independently of certain acts, which will next be mentioned, it would be of no effect.

From the Master's report it appears that, in the interval of a week or less between this interview and the debtor's failure, "the physical separation of the collaterals by means of envelopes or gum bands was entirely dispensed with, and they were mingled together in a common receptacle." It

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further appears that the loan by the Philadelphia house, which amounted, on the 9th of October, 1871, to two hundred and thirty-two thousand dollars, was reduced by the payment of forty-seven thousand dollars on the 12th of that month, when six hundred and fifty-three shares of stock of the Pennsylvania Railroad Company, *pledged originally for the loan by the New York house*, were taken away by the debtor. The balance due to the Philadelphia house was further reduced by a payment of fifty-six thousand dollars on the next following day, when five hundred shares of the stock of the same company and twenty-eight thousand dollars of the six per cent. loan of the city of Philadelphia, both likewise *originally pledged to the New York house*, were taken away by him. The payments of these two amounts, together one hundred and three thousand dollars, thus made by the debtor to the Philadelphia house, appear, by their memoranda and by his books, to have been appropriated by him and them in reduction of his debt to them. The Master states that a further reduction of the debt to the Philadelphia house was made by a like payment of eighteen thousand six hundred and forty-five dollars, on the 16th of the same month, when about three hundred and thirty-four shares of stock of the Pennsylvania Railroad Company were taken away by the debtor from those which had been originally pledged for the loan by the New York house. This payment, according to the Master's report, was credited by the defendants on their memorandum as made on account of the debt to the Philadelphia house, but does not appear to have been so entered on the books of the debtor.

If all the members of the two houses had not been the same persons, every one of these appropriations would have been a conversion of securities of the New York house to the use of the Philadelphia house; and every such conversion would have been a fraud upon any non-assenting member of the New York firm, who was not also one of the Philadelphia firm. In that case, restitution of the securities, or of their value, would have been compellable under proceedings in equity at the suit of the non-assenting party. It appears

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from the Master's report, that if such restitution had been made, there would not ultimately have been any deficiency in the value of the securities to cover the whole amount of the loans made by both houses. Now, it might be suggested that although the two houses were composed of the same persons, and therefore no such adversary relation could arise, yet the only reason for excluding them as a single joint creditor from an indiscriminate general lien upon all the securities, considered as a common fund, depends upon the implied conventional analogy to firms not composed wholly of the same persons, and that we should adhere to this analogy in all its consequences. If the suggestion were fully admitted, it might be supposed to follow that the New York house was equitably subrogated for the Philadelphia house, to the extent in value of the securities diverted by the latter house from their original appropriation. A confused notion of such a right of substitution seems to have been in the mind of one of the defendants while under examination as a witness.

I have not, however, been able to conceive a practical definition of any cognizable equity so founded upon the suggestion as would be applicable to the present case, independently of the question of express or tacit convention.

The case must therefore be considered upon the latter question alone.

Here the question differs very materially from what it would have been if the persons composing the two houses had not been wholly the same. If there had been a member of either house of the defendants who was not a member of their other house, the two houses or firms would have had separate rights of action against the bankrupt, which could not have been consolidated. Each firm would then have had its own general lien upon the securities deposited with such firm. This lien would have attached for the specific advances and also for the general balance of account of such firm. But to establish an ulterior right of either firm, if thus composed of different members, to retain a surplus in value of securities in order to cover a deficiency in the value of those

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deposited with the other firm, some positive act of appropriation, or equivalent agreement, would be necessary. Lord Eldon said that "*understanding alone*, unless in a fair sense amounting to agreement, would not do." (2 Ves. & B., 84.) I think that the present evidence would not suffice for the purpose in such a case.

Composed, however, as the two houses were in the present case, of the same persons, the question is merely one of *rebutting an implication*. If the names of the houses had been the same, the ulterior general lien would have attached. The implication of a conventional exclusion of such a lien would arise only from the difference in their names. The question is, whether the special circumstances which have been proved suffice to rebut this conventional implication. In the mere constitution of the two houses, there was nothing whatever incompatible with as extended a lien as if their names had been the same. It is true that, on the question of rebutting the implication, the remark of Lord Eldon applies to a certain extent; but its application is narrowed, because the question is both a different and a more limited one. A mere mental purpose or intention, such as the defendants, in their answer, call an *understanding*, is no criterion of right. (See 17 Wallace, 20 head note, pl. 8, and pp. 28, 29.) Testimony of such simple belief or understanding is inadmissible. This rule, which has always been observed, has acquired great practical importance since parties litigant have been examinable as witnesses.

The proper inquiry is, whether the declarations or acts of the parties in the interval which has been mentioned sufficiently indicated that the securities were conventionally commingled, so that they could be shifted at the option of the defendants from one of their houses to the other.

I cannot attribute such an effect to the simple fact that the debtor knew the two creditor houses to be composed of the same persons. The intention to separate the possession and control might, with reason, be attributable, notwithstanding such knowledge.

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But where such knowledge exists, and the *declarations* or *acts* of the parties, pending the business, indicate a belief upon each side that either house may control the securities deposited with the other house, the case becomes, in principle, the same as if their business had been conducted at each place in the same name. In that case, if they had kept two distinct accounts with the debtor, this fact would, as we have seen, have been immaterial.

We have no sufficient knowledge of any such *declarations* of the parties in the interview which has been mentioned as can be judicially acted upon. But their subsequent *acts* directly negative any continuing intended apportionment of the lien, and indicate that, after the interview, all the securities were blended as a common fund, which was treated as the subject of an indiscriminate general lien of the two houses. It is immaterial whether *such acts* determine the effect of what may, in the previous conversation, have been agreed upon, or constitute independent proof in themselves of a blending of the securities in a common fund. In either view of the subject the effect is the same.

The indiscriminate or ulterior lien may, therefore, be considered as having attached to all the securities at each place, notwithstanding the difference in the names of the two houses.

This indiscriminate lien attached before the failure of the bankrupt on the 16th of October, and before the defendants had reason to believe that his failure was impending. Had this been otherwise, the Bankrupt Law would have prevented their agreement with him, made immediately after his failure, from taking effect for their benefit.

But inasmuch as their prior lien continued, this agreement was neither actually nor constructively in fraud of the Bankrupt Law. The agreement is, therefore, available to the extent of placing them on the same legal and equitable footing as if the securities had been originally received by them under a contract enabling them to make sales in such manner as the agreement authorizes.

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But such a contract, so far as it enables creditors to extinguish their debtor's right of redemption by a sale, must, like all contracts affecting equities of redemption, be construed benignantly for the debtor,—as benignantly for him as may consist with security of the creditors. It is not necessary to consider how far an agreement enabling them to sacrifice the securities would, if made at such a crisis of insolvency, have contravened the Bankrupt Law. The inquiry may be dispensed with, because, if bankruptcy had not occurred, the rule of interpretation of the contract would exclude any such unreasonable extension of the power.

How far, and on what conditions, if no such posterior agreement had been made, and no prior express authority to sell had been conferred, the defendants might have sold the securities on default of payment by the debtor, is likewise an unnecessary inquiry. The posterior contract has the same effect as if a reasonable authority of the kind had been conferred when the securities were deposited. It is an authority to sell them at public or private sale for cash or on credit, and, as I think, to sell before or after the maturity of the respective advances. But creditors in whom such an authority is vested cannot exercise it otherwise than under a trust for the debtor's benefit as well as their own. They are not to frustrate any just expectations of a surplus by forcing sales for barely enough money to secure themselves.

There was thus a trust vested in the defendants for the residuary benefit of the bankrupt and of his estate. And the only remaining question is whether this part of their trust has been duly executed.

The question may be considered as to the mode and as to the times of sale.

As to the mode, I am not aware of any reason that the sales should have been by auction. On the contrary, I think that, considering the nature of the securities, this would not have been an advantageous mode of disposing of them if there was a fair market for them at the stock exchange or brokers' board, where the ruling prices ordinarily fix the standard

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value, from time to time, of such securities. If the times of sale were proper, this mode was unobjectionable.

The dates of the sales have not been precisely ascertained. An account with the bankrupt on the defendants' books was opened by them, for the first time, on the 23d of October, 1871, a week after his failure. The first entries in this account are dated on the 17th of October, 1871, the day next after his failure, charging him with several hundred thousand dollars. According to this account, sales of the securities to a very large amount were made at several times before the 24th of that month ; other sales were made on the 25th of October and on the 3d of November ; others on the 6th, 7th, and 9th of November ; and the remaining sales, netting a large amount, on the 18th of November, 1871. One of the defendants testifies, however, that the last sales were made, as he thinks, on the 9th, or it might have been on the 7th, of November, the credits under date of the 18th of that month "being receipts arising from sales made at an earlier date, and prior to the 9th." He adds :—"The city sixes delivered on the 18th of November had been sold shortly subsequent to Mr. Yerkes's failure ; but, in consequence of the refusal of the City Comptroller to countersign, we were not able to deliver to the parties until the 18th." The possible importance of this discrepancy will be seen hereafter.

There is no reason whatever to doubt that all the sales were made at the highest market rates obtainable at the respective times of sale. The only question is whether the sales were unduly precipitated. Another of the defendants testifies as follows :—"We could have sold out the stocks at once and paid the debt had we been disposed to have done so ; but we preferred having Mr. Yerkes nurse his stocks along so as to get more for them, and meet the market gradually,—in other words, we did not want to slaughter his stocks." That the witness was mistaken as to the existence of a rightful power to sacrifice them, would be unimportant if they were not in fact sacrificed. He further testifies thus : "A large portion of these stocks were sold on time, in order that a better price

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could be obtained than a cash sale—a forced sale. If I had not had that judgment that the market was going down further, I could have kept those stocks instead of selling them, and possibly have produced more money, because the *market went up* afterwards. My idea was that the Chicago fire had destroyed about two hundred millions of dollars, and I could not see any future for speculative stocks.” Question.—What was the character of the stocks? Answer.—“We had Philadelphia and Erie, Lehigh, Pennsylvania Railroad; most of them were speculative stocks and non-dividend-paying stocks. The Pennsylvania Railroad stock, I thought, would decline from the interruption of the trade with Chicago and the great west. Had I held similar stocks, even without need of money I should have sold.”

That a sudden depression of prices, caused by an extraordinary fire, would, in a country like ours, be permanent, or that they would probably fall still lower from the same local cause, was a somewhat arbitrary theory. The sales in question were in fact made on a *rising market*, and they were made for not more than just about enough to cover the debt. If there had been a little further delay, there would have been a surplus from a rise in prices, which would not have been properly called speculative. If the stocks were rightly described by him as speculative, the course pursued was not the less disastrous. In the absence of ratification, express or implied, I would pause long before deciding that the sales were such as would have been made by a prudent owner of the securities in order to raise, within a reasonable time, from the sale of them, a fair surplus above the amount of the defendants' advances. There would seem to have been no thought of a prospective surplus in value.

But if this were a right statement of the question, it could not be decided without considering another question. It is that of ratification or acquiescence.

The assignment to the complainants gave them, for general purposes, a title, by relation to the commencement of the proceedings in bankruptcy on the 10th of November, 1871.

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On 24th of October, 1871, the bankrupt had made a voluntary general assignment for the equal benefit of his creditors. That assignment was recorded on 4th November, 1871. Though voidable, and afterwards avoided at the suit of the complainants, it was not, in the mean time, void.

I fully concur with the Master in opinion that the mere insolvency of the debtor, before his voluntary assignment, did not supersede or affect his residuary ownership of the securities which were subject to the defendants' advances. The defendants must have been aware of the precariousness of this ownership. But while it continued, they were not the less entitled to any benefit derivable from it. Now, it is distinctly proved that if the sales were not made through his own agency, he was fully apprised of and acquiesced in all of them. It is true that he seems to have supposed himself at the mercy, in this respect, of the defendants. But I cannot discover anything in the evidence, before his voluntary assignment, which diminishes the legal or equitable effect of his ratification or concurrence. I think that the complainants, therefore, cannot have any relief as to the sales made before the 24th of October, 1871.

But the mistakes in law of these parties may affect the question as to subsequent sales. As to the sales made between the 24th of October and the 10th of November, 1871, I am not quite sure that the complainants are bound to prove notice of the voluntary assignment.

I do not think it clear upon the evidence that none of the defendants knew of this assignment. There seems to be some reason to believe, though there is perhaps no distinct proof on the subject, that the voluntary assignee, in relation to all the securities unsold at the date of the assignment to him, confided the execution of the trust to the bankrupt, who was formally or informally that assignee's agent as to these dependencies.

It might not, in an ordinary case, have been culpably unsafe to rely thus upon the judgment of the bankrupt where his experience must have been greater than that of the assignee.

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But the truth may, perhaps, be that the assignee gave himself no concern whatever about the matter. If so, as he would, upon inquiry, have learned that the bankrupt had incorrect notions of the powers and rights of the defendants, the interests of the general creditors were not properly guarded. This part of the case, perhaps, requires further development.

If any sales were made after the 10th of November, no ratification of, or acquiescence in them, can be imputable to the complainants. But it may be questionable whether the title of the voluntary assignee was abrogated from that date, and may also be doubtful whether all the sales were not made before it.

The case may be argued before a full court. If a further reference to the Master shall become necessary, definite instructions to him will probably be given.

NOTE.—The case was subsequently argued before the Circuit Court, and the exceptions were dismissed and a decree made in accordance with the Master's report; the costs to be paid by the defendants. No additional opinion was delivered.

UNITED STATES CIRCUIT COURT.—LOUISIANA.

A voluntary conveyance by a person not in debt, cannot generally be assailed as fraudulent by subsequent creditors. The omission to record a voluntary conveyance is a badge of fraud. The assignee represents creditors, and may impeach a deed which is void as against them for want of due registration.

JACOB BARKER v. SAMUEL SMITH et al.

THIS was a bill in equity filed in the District Court and brought to this court by appeal. The case was submitted to the Circuit Court upon the pleadings and evidence for final decree.

Mr. *John A. Campbell*, for complainant.

Mr. *A. Micou*, for defendant.

WOODS, J.—The facts in the case are these: On the 30th of September, 1857, Jacob Barker was seized in fee and

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was in possession of a certain parcel of real estate in the city of New Orleans. On that day, by his deed of that date, he conveyed the real estate to his son, Abraham Barker, the complainant. Although the deed was absolute on its face, yet the conveyance was made to Abraham Barker in trust for Elizabeth Barker, wife of Jacob Barker, and mother of complainant.

The consideration, as claimed by complainant, was eight thousand dollars; made up by the cancellation of two notes for thirteen hundred dollars each, with interest, made by Jacob Barker, and held by Elizabeth Barker, the payee; by the payment by the trustee, for Jacob Barker, of a balance due Barker Brothers, and a credit for the remainder in favor of Jacob Barker on the books of the trustee.

The deed was not recorded until the 14th day of July, 1869. In the meantime, about the year 1861, Mrs. Elizabeth Barker died, having provided by her last will that the whole income of her estate, or so much thereof as might be necessary, and, if required, the principal, or some part thereof, should be devoted to the support of the said Jacob, and such members of the family as might in his discretion require it.

Both before and after the death of Mrs. Barker, Jacob Barker collected the rents and paid the taxes upon the property, he being a resident of New Orleans, where the property was situated, and Abraham Barker, the trustee, a resident of Philadelphia.

In June, 1867, Jacob Barker was adjudged a bankrupt by the United States District Court of Louisiana, and placed upon his schedules, through inadvertence and mistake, as he testifies, the parcel of real estate conveyed to complainant in 1857, and afterwards it was sold by the assignee to the defendant, Samuel Smith.

Jacob Barker, for many years prior to the date of his deed to Abraham Barker, had been a prominent business man and banker in New Orleans, of great reputed wealth, and so continued until the date of his bankruptcy in 1867.

The prayer of the bill is that the sale to Smith may be set

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aside, and the property re-conveyed to the complainant, or that he may receive the proceeds of the sale made to Smith.

Samuel Smith, one of the defendants, files an answer, in which he says he is willing to abide by the order of the court in the premises, and if the court shall decide that the sale to him should be annulled, consents thereto on the repayment to him of the purchase-money.

The assignee defends against the bill on two grounds:— 1st, Because the deed to Abraham Barker was simulated and intended to defraud the creditors of Jacob Barker; and 2d, Because the failure to record the deed rendered it null and void; and as the assignee was appointed before the deed was recorded, he can, as the representative of the creditors, insist on the invalidity of the deed. These defenses present the points that demand our attention.

First. Is the deed of September 30, 1857, void, because executed in fraud of creditors? There is not a word of evidence in the record to show that in 1857 Jacob Barker had a creditor in the world. On the other hand, all the facts in the case are consistent with the theory, that being a man of large means and independent fortune, in no pecuniary strait, and wishing to put in the hands of a trustee trust property held by him for his wife, he made the deed in question. As all the parties were members of the same family, it was not thought necessary to transact the business with the formality and precision usually employed when the transaction is between strangers. Had it really been the purpose of Jacob Barker to defraud his creditors, he would have been careful to see that the deed was executed and recorded in strict compliance with the law. But it is not necessary to argue the question of fraudulent intent against creditors, because there is, as just stated, no proof that there were any creditors when the deed was executed and delivered.

Can those who were not creditors at that time, but who became so, years afterwards, complain of the deed as fraudulent? It seems clear that generally they cannot. The doctrine established by the Supreme Court of the United

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States is, that a voluntary conveyance made by a person, not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors, on the ground of its being voluntary. It must be shown to have been fraudulent, or made with a view to future debts. *Sexton v. Wheaton*, 8 Wheat., 229; *Hinde v. Longworth*, 11 Wheat., 199. See also *Bennett v. Bedford Bank*, 11 Mass., 421.

There is nothing in the record which tends in the slightest degree to show that any of the creditors of Jacob Barker who are represented by the assignee were such, at the date of the deed to Abraham Barker, nor that the purpose of that conveyance was to defraud any of his present creditors.

If the present creditors have any right to complain, it is not because the deed of 1857 was made in actual fraud of those to whom Jacob Barker was then indebted, but because it was not recorded, and because they have given him credit on the strength of his presumed ownership of the property conveyed thereby.

A deed not at first fraudulent, may become so by being concealed, because, by its concealment, persons may be induced to give credit to the grantor. *Hildreth v. Sands*, 2 Johns. Ch., 35; *Hilderbrun v. Brown*, 17 B. Mon., 779.

A deed concealed from the public, the grantor remaining in possession and acquiring credit on the strength of his supposed ownership of the property, is fraudulent. *Woresley v. De Mattos*, 1 Burr, 467; *Hungerford v. Earle*, 2 Vern., 261; *Lewkner v. Freeman*, 2 Freem. 236; *Constantine v. Twelves*, 29 Ala., 607.

This brings up the second question, whether the failure to record the deed avoids it as to creditors.

The Code of Louisiana gives no effect to acts of alienation as against creditors or *bona fide* purchasers, unless they have been regularly registered. This is conceded; but counsel for complainant says that the creditors, as against whom an unrecorded deed is void, are those only who have obtained a judgment which created a lien or privilege on the land, and not general creditors. Whether the provision of the law is thus limited, is the precise question now for solution.

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The general rule is that a creditor cannot proceed to set aside a conveyance of real estate, either really or constructively fraudulent, unless he has a lien thereon, or has reduced his claim to judgment, and the fraudulent conveyance is an obstacle to a sale on execution. *Day v. Washburn*, 23 How., 309; *Jones v. Green*, 1 Wall., 330; *Coleman v. Crocker*, 1 Ves., Jr., 160; *Brinkerhoof v. Brown*, 4 Johns. Ch., 671.

Conceding that a general creditor having no lien or judgment, could not file a bill to set aside as void an unrecorded conveyance of real estate, and to subject the property to the payment of his debts, does this rule apply to an assignee in bankruptcy?

In the case of *Carr v. Hilton*, 1 Curtis, 230, a bill in equity was sustained by an assignee to subject property conveyed by the bankrupt in fraud of his creditors, to administration for their benefit. In many other cases this has been done.

It would appear that an adjudication of bankruptcy removes the necessity for a lien or judgment before a bill can be filed to subject the property fraudulently conveyed, or when the transfer is for other reasons invalid. If the rule were otherwise, then no property conveyed by a bankrupt in fraud of his creditors, or by any void or invalid conveyance, unless the creditors had reduced their claims to judgment, could be subjected by the assignee in bankruptcy, to the payment of debts. For after an adjudication of bankruptcy, no creditor whose debt is provable, is allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the bankrupt's discharge shall be determined. Bankrupt Act, Section 21.

The question under consideration was decided by Woodruff, Circuit Judge (*In re Leland et al.*, 10 Blatch., 503), in the case of an unrecorded mortgage of chattels. The learned judge says: "It is claimed, because the mortgage is valid without being properly filed as against the bankrupts, it is, therefore, good as against their assignee in bankruptcy, and that no creditor but a judgment creditor can impeach or deny its validity.

Barker v. Smith et al.

“The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the debtor's property to their use, and the assignee in bankruptcy represents them. He is trustee for them, and whatever right they might assert, if they had obtained judgments, he may, for their benefit, assert, whether it be to set aside conveyances by the bankrupts which are fraudulent and void as against creditors, or which are otherwise as against them invalid.”

The case stands thus: Jacob Barker, in 1857, was seized of the real estate in dispute. He attempted to convey it by a deed which his grantee failed to record, and he remained in possession. This failure to record the deed made it inoperative as against subsequent purchasers and creditors. So far as their rights are involved, the title still remained in Jacob Barker until his bankruptcy in 1867. By the adjudication, the rights of the creditors were vested in the assignee. The want of judgments in their favor is supplied by the adjudication of bankruptcy, which authorizes the assignee to file a bill to subject the property to administration, just as if he were a judgment or lien creditor. But the property has been delivered to him without suit, and its proceeds are in his hands for distribution. If it is rightfully thus, if under the circumstances of this case, by his bill in equity he could have subjected the property, then it follows his rights are superior to the rights of the grantee of the unrecorded deed to the property, and that the bill of the latter to set up his claim is without equity.

The bill must therefore be dismissed.

In re Hinsdale and Doughty.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

If a trustee, who has been appointed under the 43d Section of the Bankruptcy Act, call a second general meeting of the creditors, the fees of the Register incident to such meeting are not chargeable against the estate.

In re RICHARD H. HINSDALE and EDWARD E. D. DOUGHTY.

THE Register in this case certified to the court that the property of the bankrupts had been, pursuant to the 43d Section of the Bankrupt Act, conveyed to a trustee, to be distributed under the direction of a committee of the creditors; that the question had arisen whether the estate was liable for the fees of the Register incident to a second general meeting of the creditors; and that in his opinion, the estate was not so liable.

BLATCHFORD, J.—Assuming, though it is not so stated in the certificate of the Register, that the second general meeting was called by the trustee, I find in the act no authority or direction for the calling of such meeting by the trustee. I see nothing, therefore, in the facts certified, that can warrant the charging against, or paying out of, the estate of the bankrupts, the fees of the Register upon or incident to such meeting.

Black v. McClelland.

UNITED STATES CIRCUIT COURT.—W. D. PENNSYLVANIA.

A mere verdict in an action for a personal tort is not a provable debt.

A judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy, upon a verdict rendered before that time, is not a provable debt.

A party who holds a judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy, need not apply to the District Court for leave to issue an execution.

BLACK v. McCLELLAND.

On the 11th of August last, application was made to Judge McCandless, of the District Court of the United States, to permit the plaintiff to issue process on the judgment obtained by Black against McClelland, in the Court of Common Pleas No. 2, for the county of Allegheny. The application set forth that on the 7th of May, 1874, an action was instituted in the District Court (now Court of Common Pleas No. 2), by Black against McClelland, for injuries done by McClelland to the petitioner in punching out his eye with an umbrella. The petitioner further sets forth that on the 12th of January, 1875, he recovered a verdict for three thousand eight hundred and fifty dollars against McClelland as damages; that on the 15th of January, 1875, a motion for a new trial was made, and on the 2d of April, 1875, after argument, this motion was refused; that on the 6th of May, 1875, judgment was entered on the verdict. That after the verdict and prior to the entry of judgment (to wit, on the 20th of March, 1875), said McClelland filed his petition in bankruptcy, and was on the same day adjudicated a bankrupt. The petitioner prayed the District Court of the United States for leave to issue process from the State court for the collection of his debt.

The case was argued by *David Reed, Esq.*, for Black, and *C. S. Raymond, Esq.*, for McClelland, before his Honor, Wilson McCandless.

The petitioner's counsel claimed, as the verdict was for damages in *tort* and no judgment being entered upon the verdict at the time of the adjudication in bankruptcy, it was not

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a debt provable in bankruptcy at the time of adjudication, and consequently the proceeding in bankruptcy was not a discharge of the debt, and he should be allowed to issue process for the collection of the debt.

To this application Judge McCandless made the following order on August 19th, 1875 :

“Motion allowed and leave granted to issue execution in the case of *C. L. Black v. Wm. H. McClelland*, No. —, July Term, 1874, Common Pleas, Allegheny county.”

The defendant, McClelland, appealed to the Circuit Court, and the case was, on August 28th, 1875, argued by the same counsel, before Hon. Wm. McKennan, Judge of the Circuit Court of the United States.

MCKENNAN, J.—By the 19th Section of the Bankrupt Act, the time of the adjudication of bankruptcy is fixed as the date with reference to which the provable character of the bankrupt's liabilities are to be determined ; liabilities which are not within the category of provable debts, as the act enumerates and describes them, are not chargeable upon the bankrupt's estate, and are not discharged by his certificate.

In this case the plaintiff was adjudicated a bankrupt on his own petition. Before the filing of the petition an action of trespass against him for an assault and battery, brought by the respondent in this proceeding in the State court, had been tried and a verdict rendered in favor of the plaintiff, but a motion for a new trial was made by the defendant, and judgment was not entered upon the verdict until after adjudication in bankruptcy. The question, then, upon which the result of the present proceeding depends is, whether the amount of the verdict is a provable debt against the bankrupt. In England this was long a subject of contention, and the decisions of the English courts touching it are in direct conflict with each other. But in *ex parte Hill*, 11 Ves., 646, where the question came before Lord Eldon, incidentally, he discussed most of the cases on both sides of it, and expressed strong doubt of the soundness of those which held that a ver-

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dict in an action for damages for a *tort* was a provable debt in bankruptcy, and in *ex parte* Charles, 16 Ves., 256, where it was directly presented for decision, he ordered a commission in bankruptcy to be superseded, which was issued upon a creditor's petition, whose debt consisted of a verdict for damages in an action of breach of promise of marriage rendered before the act of bankruptcy, and upon which judgment was entered before the allowance of the commission. At the same time he directed a case to be stated for the opinion of the judges of the King's Bench, who after full argument and deliberate consideration of the question, with all the cases bearing upon it, unanimously certified their opinion that the debt of the petitioning creditor was not sufficient in law to support the commission. *Ex parte* Charles, 14 East, 197. Since then the law has been settled accordingly in England.

The phraseology of the American act seems to have been employed with reference to the exposition of the English statute. All debts due or owing before the bankruptcy are provable under the British statute, but in the enumeration in the American act, this class of provable indebtedness is restricted to debts which are not only due, but payable at the time of the adjudication, or whose payment is postponed to a future day.

Now, a claim which has not obtained the condition of a fixed liability cannot be characterized as a debt due and payable, either presently or at a future day, and such is the immature character of a mere verdict before judgment. It is subject to the control and discretion of the court, and may be superseded altogether by arresting judgment upon it, or by the allowance of a new trial. No action could be maintained upon it; it does not bear interest, and no determinate character is impressed upon it until the court has pronounced its judgment, that the plaintiff do recover from the defendant the amount of it. The judgment establishes the indebtedness and impresses the obligation of payment, and so may be said to create the debt. Not until it has passed is there a debt due and payable.

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The respondent's debt was not, therefore, in the category of debts provable against the bankrupt's estate at the time of the adjudication, and so it was not necessary for him to apply to the Bankruptcy Court for leave to take judgment on the verdict, or to issue execution thereon; and the bill of review must be dismissed at the cost of the complainant.

SUPREME COURT—INDIANA.

If a mortgagee institutes proceedings to foreclose a mortgage after the commencement of the proceedings in bankruptcy, such proceedings may, on the application of the assignee, be stayed until the bankruptcy proceedings are closed.

MARKSON et al. v. HANEY.

FROM the Steuben Circuit Court.

W. H. Coombs, W. H. H. Miller, J. Morris, and W. H. Withers, for appellants.

J. S. Frazer, E. V. Long, C. W. Chapman, and E. Haymond, for appellee.

WORDEN, C. J.—This was an action by Haney against Antepas Thomas, to foreclose a mortgage executed by the latter to Haney, on certain lands in Kosciusko county, to secure the payment of twenty-six thousand five hundred dollars. The appellants, Markson and Spalding, were made defendants, it being alleged in the complaint that they claimed title to the land by virtue of conveyances made after the execution of the mortgage.

The complaint was filed November 21, 1870. The defendants were brought in on publication. Thomas failed to appear, and was defaulted. Markson and Spalding answered. A change of venue in the case was taken to Steuben county, where it was tried, resulting in a verdict for the plaintiff, and judgment of foreclosure.

Markson and Spalding made no claim to the property in their own right, but only as assignees in bankruptcy of said

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Thomas and one John R. Edwards. They filed an answer, amongst others in abatement, to which a demurrer was sustained and they excepted. This ruling is assigned for error, but, as we understand the brief of counsel for appellants, they do not desire to make any point upon it. We, therefore, need not notice it. They say, "As the only questions we care to present to this court are fully presented by the bill of exceptions, we shall not ask the court to wade through this unnecessarily voluminous record." We have, however, gone through the record, and now proceed to the consideration of the questions presented by the bill of exceptions.

It appears by the bill that the defendants, Markson and Spalding, filed a petition, or written motion, in the court below, asking that the proceedings in the cause be stayed until certain proceedings in bankruptcy, hereinafter mentioned, should be closed; but the application was overruled, and the appellants excepted. The appellants, on the application to stay, showed by the proper record the following facts:

That on December 16, 1869, the said Antepas Thomas and John R. Edwards, as partners, on the petition of their creditors, were duly adjudged to be bankrupts by the District Court of the United States for the District of Kansas; that such proceedings were afterward had in that court as that the appellants, Markson and Spalding, were duly appointed as assignees of said bankrupts, and an assignment or conveyance was made to them of the assets of the bankrupts, as provided for in the 14th Section of the Bankrupt Law; that afterward, in February, 1871, the appellants, as such assignees, filed their petition in the said District Court, alleging that Thomas was the owner of the land mortgaged at the time of the filing of the petition in bankruptcy; that the title had come to them as such assignees; that Daniel Haney claimed to have a mortgage on the land to secure the payment of twenty-six thousand five hundred dollars; that the mortgage was fraudulent and void. They prayed for an order of the court authorizing them to sell the land free from incumbrances, and to hold the

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funds received therefor in place of the land. Thereupon, the court having found that a reasonable notice had been given to Haney in that behalf, it was ordered by the court that the appellants herein, as such assignees, proceed to sell the land free and clear of the incumbrance of said mortgage, at public auction, at the door of the court-house, in Kosciusko county, Indiana, after having given notice, etc., and having notified Haney by mail, postpaid, etc., and that the proceeds of the sale be paid to the clerk of said court, or to the Register, to abide the determination and order of the court upon the validity of Haney's claim upon the mortgage. The proceedings in bankruptcy do not appear to be closed.

The question arises, whether on these facts the court erred in overruling the application to stay proceedings.

There can be no doubt that an adjudication in bankruptcy, an appointment of assignees, and the assignment to them of the property of the bankrupt, as contemplated in the 14th Section of the act, vests title in the assignees to all the property of the bankrupt held by him at the commencement of the proceedings in bankruptcy, real or personal, situate not in the district merely, but anywhere within the limits of the United States. This is clear from the general features of the law, as well as from the provision requiring the assignment to be recorded in every registry of deeds or other office within the United States where a conveyance of any land owned by the bankrupt ought to be recorded, and making the record of such assignment, or a duly certified copy thereof, evidence thereof in all courts. Assignees appointed in one district may sue in the District Courts of other districts. *Shearman v. Bingham*, 7 N. B. R., 490.

By the 1st Section of the Bankrupt Act, the jurisdiction conferred upon the District Courts of the United States is extended :

“To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy ;

“To the collection of all the assets of the bankrupt ;

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“To the ascertainment and liquidation of the liens and the specific claims thereon ;

“To the adjustment of the various priorities and conflicting interests of all parties ;

“And to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors ;

“And to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.”

On the subject of the power of the Federal courts to deal with liens on the property of the bankrupt, we quote the following paragraph from the opinion of the court in the case of *Clifton v. Foster*, 3 N. B. R., 656 ; 103 Mass., 233. The court say :

“Under the provisions of the Bankrupt Act, already cited, the courts of the United States, sitting in bankruptcy, may indeed authorize the assignee to redeem the property and discharge the lien ; or they may order the entire property to be sold, and ascertain the amount of the debt secured by the lien, in which case that debt would be preferred in the distribution of the proceeds, and the purchaser of the estate would take it discharged of all incumbrances. *Houston v. City Bank*, 6 How., 486 ; *Fowler v. Hart*, 13 How., 373 ; *Wiswall v. Sampson*, 14 How., 52 ; *Pulliam v. Osborne*, 17 How., 471 ; *In re Baum*, 1 N. B. R., 5 ; *Foster v. Ames*, 2 N. B. R., 455. But, on the other hand, those courts may, in their discretion, without investigating the validity or the extent of the lien, allow the assignee to sell the property subject to the lien, and the bankrupt's estate to be finally settled, without any determination of the rights claimed under the lien, in which case the petitioner would retain those rights as against the purchaser of the property. *Wiswall v. Sampson*, 14 How., 52 ; *Briggs v. Stevens*, 7 Law Reporter, 281 ; *In re McClellan*, 1 N. B. R., 389 ; *In re Bowie*, 1 N. B. R., 628 ; *Foster v. Ames*, 2 N. B. R., 455.” Thus it is seen that before the commencement

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of this action the District Court of the United States for the District of Kansas had acquired, both in fact and in point of law, full and complete jurisdiction over the matter in controversy.

In Bump on Bankruptcy, 6th ed., p. 148, it is said: "The commencement of proceedings in bankruptcy gives to the District Court jurisdiction over the bankrupt, his estate, and all parties and questions connected therewith. The property and estate of the bankrupt, so far as any interference therewith is concerned, is thereby brought, *eo instante*, into the Court of Bankruptcy, and placed in its custody and under its protection, as fully as if actually brought into the visible presence of the court. Its jurisdiction is superior and exclusive in all matters arising under the act. The officer appointed to manage it is accountable to the court appointing him, and to that court alone. No court of an independent State jurisdiction can withdraw the property surrendered, or determine in any degree the manner of its disposition. Claims against the estate, so long as it remains in the possession of the court, can generally be only enforced by proceedings properly instituted therein, or under its authority."

We are of opinion that as the Federal court for the district of Kansas had thus acquired plenary jurisdiction over the matter, the State court could not rightfully proceed to adjudicate upon the matters involved, so long as the proceedings were thus pending in the Federal court, and, therefore, that the court below erred in overruling the motion to stay proceedings.

The case of *Clifton v. Foster, supra*, is directly in point. That was the case of a lien on real estate of the bankrupt for materials furnished, sought to be enforced in a State court by a suit commenced after the institution of the proceeding in bankruptcy. The court said:

"Upon the institution of proceedings in bankruptcy, and the appointment of an assignee, all the property of the bankrupt passes into the custody of the courts of the United States, and cannot, while such proceedings are pending, be taken out

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of their custody upon any subsequent suit in the State courts. Pending the bankruptcy proceedings, therefore, no order could be made on this petition for the sale of the real estate to satisfy the lien of the petitioners. *Norton v. Boyd*, 3 How., 426; *Wiswall v. Sampson*, 14 How., 52; *Peale v. Phipps*, 14 How., 368; *Taylor v. Carryl*, 20 How., 583; *Foster v. The Richard Busteed*, 100 Mass., 409, 411."

The court ordered the proceedings stayed to await the action of the court in bankruptcy.

If State courts were to take jurisdiction in such cases, the consequences would be disastrous. Two different tribunals adjudicating upon the same matter might decide the same question in different ways. This is more likely to be the case in respect to questions of fact, especially when there are jury trials. But, what is worse, different sales of the same property, made under the authority of two different tribunals, each claiming to have jurisdiction over the subject-matter, would lead to profitless litigation, involving questions of conflict of jurisdiction. All these evils may be avoided by recognizing the legal proposition that where a Court of Bankruptcy has thus first acquired jurisdiction, that jurisdiction is exclusive so long as the proceedings in bankruptcy are pending.

A case has been cited to show that assignees in bankruptcy may go into a State court to set aside a fraudulent conveyance made by the bankrupt. *Gilbert v. Priest*, 8 N. B. R., 159; s. c., 63 Barb., 339. The case does not seem to be in point here, for it would by no means follow that if a State court could take jurisdiction in such case, it could also take jurisdiction of matters rightfully pending in the court in bankruptcy. The case, however, was decided by a single judge, and the decision was subsequently reversed. See the same case in 65 Barb., 444. The current of decisions, so far as we are advised, would seem to establish the proposition that State courts have no jurisdiction in such cases. *Newman v. Fisher*, 37 Md., 259; *Brigham v. Claflin*, 7 N. B. R., 412, 31 Wis., 607; *Voorhees v. Frisbie*, 8 N. B. R., 152, 25 Mich., 476.

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As to cases where suit has been instituted in a State court before proceedings in bankruptcy have been commenced, see the case of *Peck v. Jenness*, 7 How., 612.

In this case, there was an answer in abatement filed, setting up the proceedings in bankruptcy, which was held bad on demurrer. Perhaps this answer should have been held good. On this question we express no opinion, as no point is made upon it. If the case ought to have gone out of court on the answer, still the appellee cannot complain that a less summary disposition of it was asked. Even if the pendency of the bankruptcy proceedings were a matter of abatement, still the motion to stay proceedings was entirely proper, inasmuch as the lands might eventually have been sold in the bankruptcy proceedings, subject to the mortgage, in which event Haney would have the right to proceed with his foreclosure by making the proper parties. To be sure, an order had been obtained by the assignees to sell the lands clear of the mortgage, but that order was, of course, subject to be changed by the court.

It is objected by counsel for the appellee that the question we have been considering is not before us, because the overruling of the motion to stay proceedings was not made the ground of a motion for a new trial. But this is not one of the causes for which it is provided that a new trial may be had. 2 G. & H., 211, Section 352. The overruling of the appellant's motion was not an order that prevented the appellants from having a fair trial. The motion was not based upon the theory that the appellants were not then prepared for, and could not then have, a fair trial, but upon the theory that they could not be compelled to go into a trial at all as long as the proceedings in bankruptcy were pending. The question had nothing whatever to do with the fairness of the trial had.

For the error in overruling the motion to stay proceedings, the judgment below must be reversed.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to

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stay proceedings until the close of the proceedings in bankruptcy.

Petition for a rehearing overruled.

UNITED STATES DISTRICT COURT—W. D. MISSOURI.

Creditors whose debts do not exceed fifty dollars are to be disregarded in computing the majority who must pass a resolution of composition, as well as in ascertaining the number of those who are required to sign the confirmatory statement.

In re WALD & AEHLE.

KREKEL, J.—Under the 43d Section of the amended Bankrupt Act of June 22d, 1874, providing for composition with creditors, the court made an order directing a meeting of creditors to be held to act upon a composition proposed by the bankrupts.

The meeting was held, and the resolution passed as well as the confirmatory signatures of creditors are now before the court for its action. From the number of creditors who were present and represented at the meeting which passed the resolution, as well as the number signing the confirmatory statement, it becomes necessary to determine what is meant by language employed in the following part of the section referred to :

“And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor, assembled at such meeting, either in person or by proxy, and shall be confirmed by the signature thereto of the debtor, and two-thirds in number and one-half in value of all the creditors of the debtor.

“And in calculating a majority, for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars, shall be reckoned in the majority in value, but not in the majority of number.”

In re Wald & Aehle.

The question is, what creditors shall be counted, in order to ascertain the majority spoken of, and are creditors whose claims do not exceed fifty dollars, to be disregarded in computing the majority who must pass the resolution, as well as in ascertaining the number of those who are required to sign the confirmatory statement. The court holds that all creditors whose claims do not exceed fifty dollars, must be disregarded in arriving at the majorities required in both cases that is to say, in passing the resolution there must be a majority of the creditors assembled at such meeting, either in person or by proxy, excluding all whose claims do not exceed fifty dollars, to make the resolution operative, and in the confirmatory statement the number of signers required must be two-thirds after excluding from the whole number of creditors all whose claims do not exceed fifty dollars. It may be admitted that this construction will, in some cases, cause hardship, as it increases the trouble or difficulty on part of bankrupts to obtain the requisite number. It must be remembered, however, that the whole of the requirements of the bankrupt act in some sense may be called a forced proceeding, so far as the creditor is concerned, for the failing circumstances of the debtor largely interfere with his freedom of action.

A creditor may, under compulsion, as it were, attend the meeting of creditors provided for, but, suppose he does not, on account of the expense he must incur, which, though small, may be large when compared with the amount offered in composition, or he fails from any other cause to attend, the law should not, on that account, be construed against him, and favorable to the debtor who makes the offer. Throughout the whole section from which the quotation is made, greater regard is had to amounts than number. To illustrate; in providing for the taking of bankrupt estates out of the hands of the courts, and placing them in the hands of trustees selected by the creditors, *amounts* are exclusively regarded by providing that three-fourths in value of the creditors whose claims shall have been proven, shall pass the resolution.

The bankrupts will be required to bring themselves within

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the views of the court here expressed, in order to have their case passed upon favorably.

UNITED STATES DISTRICT COURT—N. D. MISSISSIPPI.

When an advance is made upon an agreement that certain and specific property shall be conveyed, and the conveyance is made within a reasonable time thereafter, the advance will be considered as a present consideration for the conveyance.

An insolvent debtor may, for a present and sufficient consideration, sell or encumber his estate, provided the transaction is *bona fide*, and free from fraud, or an intention to defeat the operation of the Bankrupt Law.

To defeat a conveyance for a present consideration, the proof must show that the party to whom or for whose benefit it was made knew or had reasonable cause to believe the grantor insolvent, and knew that a fraud upon the law was intended.

The knowledge that a fraud was intended may be established by circumstantial evidence.

GATTMAN & CO. v. R. A. HONEA, Assignee.

HILL, J.—This cause is submitted upon bill, cross bill, answers, exhibits, and proofs, from which it appears that said Smith was regarded as a successful cotton-planter of Monroe county; that to enable him to supply his plantation and laborers for the year 1873, he obtained an advance in money from a firm of commission merchants in Mobile, for which he gave his note, with one Randall as surety, and also the guarantee of complainants, which note was paid off by Smith with the exception of some three hundred dollars; that in February, 1874, Smith applied to complainants to procure for him an advance of two thousand dollars to meet his demands and carry on his farming operations for 1874. An agreement was entered into between them, by which complainants were to procure the loan from McIntosh & Gillespie, commission merchants, of Mobile, or to make the loan themselves. Negotiations were entered into with McIntosh & Gillespie, but there being some supposed defect in the title to a portion of the land upon which the security was to be given, in May they declined to make the loan, when the agreement was made between

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complainants and Smith. It was agreed that complainants would make such small advances as Smith might need, to be refunded out of the sum to be received from McIntosh & Gillespie, should that loan be obtained; but should it fail, then the advances so made were to be included in a deed of trust to be executed, conveying all his real and personal estate, for the payment of two thousand dollars or more, agreed to be made on the 12th of June, after McIntosh & Gillespie had declined to make the loan. In pursuance of the original agreement, Smith executed to complainants his three several notes, one payable October 15, 1874, for one thousand and sixty dollars and two cents; one payable November 15, 1874, for three hundred and seventy-one dollars and seventy-seven cents; and one note for one thousand and eighty dollars and fifty-eight cents, payable Nov. 15, 1874,—all of which to bear three per cent. per month interest after maturity. These notes included interest at ten per cent. to the maturity of the notes; also, two and a half per cent. for advancing. On the same day said Smith executed to Elkin, as trustee, a deed of trust conveying all of his estate, real and personal, to secure the payment of these notes, and also promising to ship to McIntosh & Gillespie, in the city of Mobile, two hundred bales of cotton, and in default to pay two dollars per bale for each bale not so shipped. On the — day of —, 1874, and before the maturity of these notes or the crop of cotton, proceedings were commenced in involuntary bankruptcy against said J. M. Smith, and on the — day of —, 1874, he was adjudicated a bankrupt, and said Honea appointed his assignee, to whom the estate was assigned by the usual deed of assignment. Honea took possession of the estate, and has sold said cotton crop, none of which, or any other cotton has been shipped by Honea or Smith, in fulfillment of their part of the agreement, nor has any part of the money due upon said notes been paid. The original bill seeks payment, out of the proceeds of the property sold and that so conveyed, of these notes, with interest; also, the sum of four hundred dollars, being two dollars per bale for the cotton not delivered.

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The cross bill charges that the said Smith, at the time said conveyance was made, was insolvent and in contemplation of bankruptcy, and that complainants had reasonable cause to believe or know that fact, and knew, at the time, that said conveyance was in fraud of the Bankrupt Law ; that a portion of the consideration of said notes was a pre-existing debt, and not for advances then and thereafter to be made, and that said conveyance was intended to give complainants a preference, and was in fraud of the Bankrupt Law, and void ; all of which is denied by the answers to the cross bill.

The question to be determined is whether or not this conveyance is valid under the Bankrupt Law, as shown from the pleadings and proofs.

The conveyance embraced all the property of the grantor, and stipulated for an unusual and ruinous rate of interest, which casts a suspicion upon the transaction, which it is incumbent upon the complainants to remove. They state in their answers, and prove by their own depositions and that of Smith, that when the agreement was made, in February, there was only a small balance due from Smith to complainants, too inconsiderable to affect the *bona fides* of the transaction ; and that it was then agreed that, for the small advances made after that time and before the conclusion of the loan, whether with McIntosh & Gillespie or complainants, security was to be given by a conveyance in trust of all Smith's property. If the loan was obtained from the Mobile merchants, then it was to be refunded out of the amount received ; and if not, then it was to be included in and secured by a trust deed on all Smith's property. There is no evidence to controvert this statement, and hence it must be held as established.

The rule, as I understand it, is this : When advances are made upon a general promise afterwards to give a security by mortgage or other conveyance, specifying no particular property upon which it is to be given, the promise amounts to nothing, and, when given, the advances so made constitute an antecedent or pre-existent debt ; but when an agreement is

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made that certain and specific property shall be conveyed, and the conveyance is made within a reasonable time thereafter, the advances will be considered as a present consideration for the conveyance.

I am of opinion that the facts proven bring the advances made after the agreement under this latter rule. The amount due to McIntosh & Gillespie was secured by Randall; hence there was no inducement to secure this debt. Besides, the testimony shows that the payment of this balance was after or at the time the conveyance was made, and out of the money loaned, so that, under the testimony and rules stated, I am satisfied that these advances cannot be held as a pre-existing debt.

The next inquiry is, Was or was not this conveyance made in fraud of, or with intent to defeat the operation of the Bankrupt Law, and with a knowledge on the part of the Gattmans that such was the object and purpose? To render it so, the evidence must show that Smith was then insolvent, or contemplated insolvency or bankruptcy: this is the first point to be ascertained.

I am satisfied, from the evidence, that Smith was, in point of fact, then insolvent, but that, in his hopefulness and with his idea of insolvency, he did not so consider himself; but had he believed himself insolvent, the proof must go further, and show that the conveyance was intended to defeat the operation of the Bankrupt Law, by preventing his property from being administered under the law, the question of preference, as already stated, being out of the way.

The rule is well settled that an insolvent debtor may, for a present and sufficient consideration, sell or encumber his estate for the purpose of paying his debts, or to enable him to carry on his business, provided the transaction is *bona fide*, and free from fraud or an intention to defeat the operation of the Bankrupt Law. To defeat the conveyance the proof must go further, and show that the party to whom, or for whose benefit the conveyance was made, at the time knew or had reasonable cause to believe the grantor insolvent, and

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under the law, as amended by the act of June 22, 1874, knew that a fraud upon the law was intended.

I uniformly held, under the law, before this amendment, that where the party for whose benefit the transfer was made had a knowledge of such facts as would put an ordinary prudent business man upon the inquiry, and which inquiry would have led him to a knowledge of the fact that the party was insolvent, and that a preference or fraud was intended, and he failed to make the inquiry, he must be held to a knowledge of that which it was his duty to know; and, further, that, as in all other cases, a party must be held to intend that which is the natural and inevitable result of his own acts. I am satisfied that this construction was correct, and applies to the act as amended, with this one exception, and that is, that the party to whom or for whose benefit the conveyance is made must not only have cause to believe, but must actually know, that a fraud upon the Bankrupt Law is intended, and, with that knowledge, participate in it by taking the conveyance. The law-makers certainly intended something by the change in substituting the word "knowing" for those of "having reasonable cause to believe." But this knowledge of the party may be established by circumstantial evidence, as may any other fact, even the commission of the highest crime known to the law; and this is especially so in cases of fraud, rarely established by positive testimony, the knowledge and motives of men usually being ascertained by their acts more than their words.

Without entering into comment upon the evidence, I am satisfied that the Gattmans were not in possession, at the time, of such circumstances as to cause them to believe Smith insolvent, and that they did not know that a fraud upon the Bankrupt Law was intended—at least, the proof does not establish such knowledge. The result is that this conveyance must be held valid, as a security for so much of the debts claimed as are supported by a legal and valid consideration, which, in the first place, includes the amount advanced, with ten per cent. interest from the time of the ad-

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vancement to the maturity of the notes ; also, two and a half per cent. for the advancement, and including also the small balance due when the agreement was first made, with ten per cent. interest.

The three per cent. interest per month after maturity of the notes, whilst *exorbitant* and *ruinous*, was not at the time forbidden by the law, and, as part of the contract, must be allowed. It, however, serves to show the *wisdom* of the Legislature in again providing some protection to the unfortunate and oppressed debtor, against the never-to-be-satisfied demands of the money-lender.

I have not been referred to any authority, either in the text-books or adjudicated cases, binding upon this court, to sustain the charge of four hundred dollars for failing to ship to McIntosh & Gillespie the two hundred bales of cotton. The evidence shows no consideration which in my judgment will uphold this agreement, which is but an artifice, upon the part of the money-lenders and commission merchants, to absorb the honest earnings of the farmer and his no less dependent laborer, and is inequitable, unjust, and oppressive, to be maintained by a court of equity. Therefore, this claim must be disallowed.

Not being sufficiently advised of the amount really due according to the rules above stated, the cause must be referred to the clerk, as master, to ascertain the amount, and report the same to the court for the further order in relation thereto.

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SUPREME COURT—RHODE ISLAND.

A creditor having a claim arising from fraud may prosecute it in any proper form of suit after the question of discharge has been determined, although he proved it and received a dividend thereon.

The word "debt," as used in the Bankrupt Law, is synonymous with claim. If the defendant in an action for the unlawful conversion of certain goods pleads a discharge, the plaintiff may reply that the claim was created by the fraud of the defendant.

STOKES & LEONARD v. ERASTUS MASON.

Trover. The case was heard on the special demurrer of

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the defendant to the plaintiffs' replication to the defendant's plea, *puis darrein*. The pleadings are stated in the opinion of the court.

S. A. Croke, Jr., for the defendant, in support of the demurrer, cited Section 34 of the National Bankrupt Act.

B. N. & S. S. Lapham, for the plaintiff, *contra*, cited Bump's Law and Practice of Bankruptcy, 308, 391, 330, note *a*; *Commonwealth v. Keeper of Jail of Philadelphia*, 4 S. & R., 505; *In re Ward E. Robinson*, 2 N. B. R., 342; *In re Charles G. Patterson*, 1 N. B. R., 307; *In re James B. Devoe*, 2 N. B. R., 27.

POTTER, J.—This is an action of trover “for that the defendant had unlawfully converted to his own use certain goods and chattels belonging to the plaintiffs,” etc., etc.

Plea, not guilty. Subsequently, defendant became bankrupt, and obtained a discharge under the United States Bankrupt Act, and pleaded his discharge as a plea *puis darrein continuance*, and that the plaintiffs' said claim was provable and was proved under the proceedings in bankruptcy, and the plaintiffs received a dividend thereon.

The plaintiffs replied that they ought not to be precluded, etc., because the debt, claim, and demand, for the recovery of which said action was brought, was created by the fraud and embezzlement of the defendant. And to this the defendant demurred, 1st, because the replication neither traverses the plea, nor confesses and avoids; and 2dly, because it is a departure—because the declaration sets out a cause of action which would be discharged under the act, and the replication alleges that the cause of action is one which is not discharged by the act.

The defendant also filed a motion to dismiss the suit, because the claim had been proved under the Bankrupt Act, and, by Section 21, the plaintiffs had thereby waived all other right of action, and surrendered and discharged all proceedings commenced thereon.

The defendant argues that the discharge covers all claims,

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etc., excepting a "*debt* created by fraud or embezzlement," etc., and that the present claim was not a debt, and that, if it was a debt, an action on the case for trover would not lie for it.

The difficulty in the present case seems to arise very much from the ambiguity of the word debt, as used in the Bankrupt Act. The plaintiffs contend that the word is there used in a sense somewhat peculiar, and that it is used in the same sense in their replication.

By Section 19, all debts due, and all debts existing but not yet payable, are provable against the estate. Provision is also made for suretyship, etc., contingent debts, and liabilities of various sorts. "All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed *as debts*." And the court may cause the damages to be assessed. "*No debts* other than *those above specified* shall be proved or allowed against the estate." Yet, by Section 33, debts arising from fraud, embezzlement, or breach of trust, may be proved, and are entitled to a dividend. By Section 21, no creditor proving his debt or claim can maintain any suit therefor, but is deemed to have waived all right of action, and all proceedings already commenced and judgments obtained are discharged thereby; and no creditor whose debt is provable shall prosecute a suit therefor to judgment, until the question of discharge is determined. By Section 33, no debt created by fraud or embezzlement, or by defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged under the act. But it may be proved, and the dividend received on account. By Section 34, the discharge releases the bankrupt from all "debts, claims, liabilities, and demands" which were or might have been proved, with the exceptions aforesaid. By Section 31, the form of the discharge specifies all "debts and claims" provable under the act, except, etc. It will be seen that, by Section 21, a creditor who *proves* his *debt* or *claim* thereby waives it, and is deemed to have surrendered it, and cannot

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sue, and from this there is no exception made of a claim arising from fraud; while no creditor whose debt, although not proved, is provable can prosecute his claim to judgment until the question of discharge is decided—seeming to imply, in the latter case, that if the suit be for a debt arising from fraud, it may then go on, as the discharge would not affect it.

It is not necessary at present to consider the question of whether a debt proved, using the word in the ordinary sense, could be prosecuted against the bankrupt if his discharge should be refused. But that this cannot be the meaning, as to a debt arising from fraud, seems evident from Sections 33 and 34. If, by proving such a debt, the creditor waives and surrenders all claims except under the Bankrupt Law, then why provide that a discharge should not affect it? And construing the sections together, it seems the intention that the claimant may present a claim arising from fraud, and receive his dividend, but shall not prosecute it until the question of discharge is determined; but that, thereafter, whether the petitioner is discharged or not, it shall remain a valid claim against him, recoverable in any proper form of suit.

This view was taken by Nelson, U. S. Circuit Judge, in the case entitled *In the matter of Robinson*, 6 Blatch., 253; s. c., 2 N. B. R., 341. And see also *In the matter of Patterson*, 1 N. B. R., 307; s. c., 2 Ben., 155. The word *debt*, as used in the act, seems to be used as synonymous with claim. In Section 19 it seems to include claims for goods or chattels wrongfully taken; and in Section 33 it is used for claims arising from fraud, etc. Now, according to our practice, it was enough for the plaintiff to allege in his declaration that his suit was for goods wrongfully converted. It was not necessary for him to allege fraud. He might, however, prove fraud upon the trial. The plaintiffs' replication, therefore, is equivalent to saying that, although you have a discharge, my claim is a debt arising from fraud within the meaning of the term *debt* as used in the Bankrupt Law, and therefore

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your discharge does not include it, and does not bar my suit.

Demurrer overruled.

UNITED STATES DISTRICT COURT—W. D. WISCONSIN.

The security that must be liquidated before the creditor can prove his debt must be upon property real or personal of the bankrupt, that may be surrendered or conveyed to the assignee.

A claim which is secured by the indorsement, guaranty, or collateral liability of a third person may be proved as unsecured.

In re ANDERSON.

Cameron & Losey, for Assignee.

Wing & Prentiss, for Creditors.

HOPKINS, J.—The bankrupt, in order to obtain credit from the firm of Richards, Shaw & Winslow, procured John Lewis to guaranty the payment of goods purchased of them by him, to an amount not exceeding two thousand dollars, whereupon credit was extended to him by said firm to the sum of about three thousand dollars, and he was indebted to them for goods sold, when he was adjudicated bankrupt, to about that amount, two thousand of which was secured by the guaranty of Lewis as hereinbefore mentioned.

After the bankruptcy, the said firm made and filed with the Register, Hon. C. Graham, proof of the whole claim as unsecured. The proof contained the usual allegations of no payments or security except the guaranty as aforesaid.

The assignee and some of the other creditors objected to the allowance of the whole as an unsecured claim against the bankrupt, contending that, to the extent of the amount guaranteed, it should be treated as a secured debt and proven as such. Thereupon, the Register, at the request of the attorneys of the respective parties, submitted and certified to this court the question, "Whether said claim should be allowed

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in gross as proven, or whether it should be allowed and proven in two separate items—one for two thousand dollars, as secured, and one for one thousand and sixty-three dollars and forty cents, being the balance of the account, as unsecured.

The counsel for the assignee has submitted an argument to me, in which it is insisted that the account, to the extent of the amount guaranteed, is a secured debt, and should be proven as such. It is not denied but that the bankrupt was indebted to these creditors for goods sold him in the amount stated in the proof. The only question, therefore, is one of law, that is, whether this debt, to the extent of the guaranty of Lewis, who is good and responsible for the amount of it, is to be regarded as a *secured* debt within the meaning of the Bankrupt Law.

This depends upon the proper interpretation of Section 5075, R. S. That section reads: "When a creditor has a mortgage or pledge of *real or personal property of the bankrupt*, or a lien *thereon*, to secure the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only to the balance of the debt due after deducting the value of such *property*, * * * * * or the creditor may release or convey his claim to the assignee upon *such property*, and be admitted to prove his debt. * *

* * * If the *property* is not so sold, or released and delivered up, the creditor shall not be allowed to prove any part of his debt."

This is the provision in regard to proving secured debts, and it so clearly defines the kind of security meant, it seems to me that there can be but little doubt that a debt secured by the guaranty, indorsement, or collateral liability of a third person does not fall within the purview of the act. The security must be upon property *real or personal of the bankrupt*, that may be surrendered or conveyed to the assignee, and the estate in his hands be augmented thereby. It, in terms, applies only to security upon *property* of the bankrupt.

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It has been held, both in this country and England (where the statute is similar to ours), that when a debt of the bankrupt is secured by the guaranty or endorsement of a third party, and such third party has secured the debt by mortgage on his own property, that such a case was neither within the spirit or meaning of the act. A creditor holding such a security could not, by a release or surrender, use it for the benefit of the bankrupt's estate. In the assignee's hands it would be wholly unavailing. It has also been held that a creditor holding security upon the separate estate of the wife of the bankrupt for his debt is not a secured creditor within the act, and may prove his debt as unsecured. 2 Mont. D. & De., Gex. 487, *Ex parte Hilderly*. In Parr's case, 18 Vesey, 65, the rule is stated that a creditor has a right, in bankruptcy, to prove and avail himself of all collateral securities from *third* persons, to the full extent of the debt. Section 5074, in harmony with this conclusion, provides that when a party is liable upon a note or contract as a member of two firms, having distinct estates to be wound up in bankruptcy, the debt may be proved as against both. See also in further elucidation and support of this view, 3 Maddock, 373, *Ex parte Goodman*; *In re Plummer*, 19 Eng. Ch., 56; Peacock's case, 3 Glynn & Jamison, 27; 3 Montague and Ayrton, 157, *Ex parte Adams*. The English authorities on this point were examined and approved by Justice Story; *In re Babcock*, 3 Story, 393. That was the case of an accommodation acceptor of a bill of exchange going into bankruptcy, and the holder of the bill having attached property of the drawer, and having also proved his debt against the acceptor's estate. Judge Story said: "Admitting the attachment to be a security, and the bankrupt to be an accommodation acceptor, it is clear that the creditor has a right to proceed against the bankrupt for his debt in bankruptcy, and also against the other parties to the bill under his attachment, until he has recovered the full amount of his debt; for it is not a security given *by the bankrupt of his own property*."

That case was like this in some respects, for it seems these

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creditors had a suit pending, when the adjudication was had, against Lewis, their guarantor, in which, I learn from the counsel's argument, they had attached property of the guarantor. *In re Cram*, 1 N. B. R., 504, this question is very fully considered, and the same conclusion reached as I have arrived at in this case. Further support of this interpretation is found in Section 5070, which authorizes indorsers or guarantors of bankrupts to prove such debts when not paid, in case the creditor holding them fails to make proof thereof, and thus obtain the benefit of all dividends in reduction of their liability.

That class of persons are within the protection of the Bankrupt act—are regarded as *quasi* creditors of the bankrupt, and entitled to have the dividends applied, as far as they go, in extinguishment of their liability for the bankrupt.

The assignee has no claim upon them or against them; they are in no sense liable to the bankrupt's estate, but the estate is under legal obligation to pay and protect them.

In *Raikes v. Todd*, 8 A. & E., 846, a guaranty very similar to this was under consideration, and in that case, as in this, the principal debtor had gone into bankruptcy, and the creditor had proven his *whole* debt, which was, in excess of the amount guaranteed. The guaranty being for a sum not exceeding two thousand pounds, and the whole debt proven being over twenty-four hundred pounds, a dividend had been paid the creditor upon the whole claim proven, of about three hundred pounds, leaving over two thousand pounds due; and an action was prosecuted against the guarantor for the two thousand pounds, the amount guaranteed by him. The defendants pleaded the amount of the dividend ratably applicable to the amount guaranteed as a payment *pro tanto*, and contended that it was to be distributed ratably over the whole balance, and that his liability was discharged to the extent of the dividend applicable to the amount guaranteed by him; that as a surety under their Bankrupt Act (the same as under ours), who had paid a debt, could stand in place of

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the creditor, the declared dividend should be appropriated as so much upon every distinct pound; the plaintiff contending that he might recover the dividend on his own proof, and apply the whole in reduction of the excess above the sum guaranteed. This claim of the plaintiff, however, was not sustained. The court held that the surety was to pay only the excess of the sum which he guaranteed over and above the dividend paid *in respect of such sum*. *Bardwell v. Lydall*, 7 Bing., 489, is to the same effect.

This seems to me a correct exposition of the meaning and principle of these provisions of the Bankrupt Act, in regard to sureties for the bankrupt, and secures to them the benefits and protection contemplated by the act. Applying this doctrine to this case, these creditors would be required to apply the dividend paid in respect to the amount guaranteed by Lewis in reduction of the claim upon him, each dollar of the claim being considered as reduced to the extent of the dividend paid by bankrupt's estate.

In that way the guarantor gets the same benefit as if he had paid the two thousand dollars guaranteed, and then proved it up himself. It is, in legal effect, the same as paying it to the guarantor, as it is paid for his benefit and in extinguishment of his liability.

This view of the equities of the case and the legal rights of the parties shows very clearly to my mind, that the creditor not only has the right to prove for the full amount, but that it is a legal duty to do so, if he proves at all.

I, therefore, hold that these creditors, Richards, Shaw & Winslow, have the right to prove their full debt against the estate of the bankrupt in this case as an unsecured debt, and remit the matter to the Register, with direction to proceed in accordance with this opinion.

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UNITED STATES DISTRICT COURT—N. D. NEW YORK.

A *feme covert*, by charging her inchoate right of dower for her husband's benefit, does not thereby become a surety for him.

An agreement that a *feme covert* is to be compensated for a release of her contingent right of dower is not to be implied.

Where real estate is covered by a mortgage, the inchoate dower attaches to the equity of redemption only.

If the holder of a note the indorser of which is secured by a mortgage, proves the note as unsecured, this does not extinguish the mortgage, for the assignee is thereupon subrogated to the rights of the holder.

The intent to consider real estate partnership assets may be implied from the fact that the losses in the transaction are to be sustained by the assets of the firm, and the profits which may accrue are to augment the capital of the firm.

When real estate is impressed with the character of personalty, the onus is on the party who alleges that it has lost that character, to show, not only that the partnership creditors have been paid, but that, as between themselves, the accounts of the partners have been settled.

A *feme covert* is not entitled to dower in real estate which was held as partnership assets.

*FRANK HISCOCK, Assignee, etc., v. MARY C. JAYCOX
and FRANCES GREEN.*

Messrs. *Frank Hiscock* and *William C. Ruger*, for assignee.

Messrs. *Geo. F. Comstock* and *A. H. Green*, for defendants.

WALLACE, J.—The complainant, as assignee in bankruptcy of Jaycox & Green, brings this action to determine the validity and extent of the rights of the defendants to dower in the real estate of the bankrupts. Of this real estate, the largest portion in value is alleged by the assignee to have been partnership assets of the bankrupts, as to which no dower interests exist; other portions belonged to the bankrupts individually; and a large part of that owned by the bankrupts jointly, and all of that owned by them individually, was, at the time of the filing of the petition in bankruptcy, subject to a mortgage, executed by Jaycox & Green and their wives, the defendants, to George F. Comstock, to secure him against liability as indorser for the firm upon negotiable paper made, or to be made, by them. At the time of the adjudication in bankruptcy Comstock was charged as indorser upon paper

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of the firm to the extent of ninety-five thousand dollars. After the adjudication, the holders of the notes indorsed by Comstock, and secured by the mortgage, proved them as unsecured claims against the bankrupt estate. Subsequently, upon the application of the assignee in bankruptcy, and upon notice to Comstock and the defendants in this action, the District Court authorized the assignee to sell the real estate at public or at private sale, free from the lien of the mortgage, and discharged from the dower interests of the defendants, transferring such liens and interests to the fund to arise from the sale. Finally, upon the consent of Comstock and of the defendants, and with the approval of the court, the assignee conveyed the mortgaged real estate to Comstock, in satisfaction of a number of the notes which had been proved against the estate, thus relieving the estate from claims against it to the extent of sixty-three thousand dollars; and by the order sanctioning this conveyance, the rights of the defendants were transferred to and made a lien upon the general fund in the hands of the assignee.

Upon these facts, and others which will be adverted to hereafter, several questions arise, which may be most conveniently considered in the following order:

First. What is the character and extent of the defendants' rights, assuming that their dower interests attached to all the real estate? Under the stipulation of the parties the defendants are to be treated as though they were creditors of the bankrupts to the extent of their rights, and the amount due them is to be enforced as a lien on the fund in the hands of the assignee. It is insisted on their behalf, that inasmuch as their dower interests have been sold to satisfy their husbands' debts, they are entitled to be treated as sureties who have paid the debt of their principals, and permitted to enforce a lien for the full value of their original dower interests. To sustain this position, it is necessary to maintain that a wife who joins with her husband in a mortgage of his real estate, for his benefit, is, in respect to her inchoate dower interest, a surety for the husband. It has long been settled,

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that when a wife pledges her separate property for the husband's debt she becomes a surety in respect to the debt, and entitled to enforce all the rights of a surety ; and it is not to be denied that her inchoate dower interest in her husband's lands is a valuable right, which may be the subject of a contract between her and a purchaser, that will be enforced for her separate benefit. Thus, a note given by a purchaser as a consideration to the wife for uniting with her husband in the conveyance of the husband's land to the purchaser, becomes her separate property. (*Nims v. Bigelow*, 45 N. H., 343.) It does not follow, however, that her dower interest is in such sense her separate property as that her contracts with her husband in regard to it are to be treated as those of a *feme sole*. No case has come under my observation, where an agreement between husband and wife, made upon the consideration of her release of dower to the husband, has, while executory, been enforced. In nearly all the cases a third person has intervened in the contract between the husband and wife (3 Paige, 440 ; 18 Wallace, 141), and in the others the agreement had been executed. The character of the interest is inconsistent with that of separate property. It is not the subject of grant or assignment ; it originates in the husband's seizin, and she cannot, without the husband's consent, separate it from his estate in the land (*Marvin v. Smith*, 46 N. Y., 571) ; and it is not her separate estate within the meaning of the statutes which permit a married woman to deal with such estate as a *feme sole*. (*Sykes v. Chadwick*, 18 Wall., 141-145.) The proposition, that by charging it for her husband's benefit she becomes a surety for him, is not correct, because she does not thereby charge her separate estate. The relation, as between them, rests on the doctrine that she is as competent in equity to contract with her husband in reference to her separate estate as a *feme sole* is (*Hudson v. Carmichael*, Kay, 613), or, as expressed by Lord Camden (*Kinnoul v. Money*, 3 Swanst., 203) : "As to the transaction the court regards the marriage as dissolved ;" and hence the same implication arises between them as arises

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when a stranger pledges his property for another's debt. In the release of her dower, can it be said the court will regard the marriage as to that act dissolved, when the subject of the release is a right which not only owes its origin, but its future existence, to the marriage relation? But it is unnecessary to rest the denial of the proposition contended for upon technical reasoning. If it should be conceded that an agreement may be made between husband and wife, whereby she is to be compensated for a release of her dower, such an agreement is not to be implied; *Hall v. Hall*, 2 McCord Ch., 269: and her rights as surety when she mortgages her separate estate for the husband's debt, arise from the implied assumpsit which springs from the transaction. If there is no implied assumpsit there is no suretyship. If, by joining with her husband in a mortgage on his lands for his debt, the relation of principal and surety arises, she would be entitled to require his interest in the land to be first sold on the foreclosure; as in the case where she mortgages her own land for his debt she may require his interest as tenant by courtesy to be sold in the first instance (*Neimcewicz v. Gahn*, 3 Paige, 614). The exercise of this right would introduce an innovation in foreclosure sales, and would defeat the main object for which, according to common understanding, the wife joins in the execution of the husband's mortgage, viz., in order that a perfect title may be obtained if it becomes necessary to foreclose. In conclusion, the fact that the doctrine now contended for on behalf of the defendants has never been advanced in any of the adjudicated cases is of itself a cogent argument against its existence.

It follows, that the rights of the defendants were, at the time the real estate vested in the assignee, simply those of inchoate dower interests. So far as they relate to the real estate covered by the mortgage to Comstock, these interests were, in the most liberal view of inchoate dower interests, in the equity of redemption only; the surplus standing in the place of the land after enough has been carved out to pay the mortgage debt.

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Second. It is insisted for the defendants, that the mortgage to Comstock has been extinguished by force of the proceedings had in bankruptcy subsequent to the adjudication, and consequently that their dower interests attach to the entire proceeds of the land mortgaged. This argument proceeds upon the assumption, that when the holders of the notes secured by the mortgage proved the notes as unsecured debts against the estate in bankruptcy, as to them the mortgage was extinguished; and while it may have been kept on foot to protect Comstock as indorser for such sum as he might be called on to pay upon the notes, when the land was conveyed to him, the mortgage was extinguished as to him. The argument is inconclusive, because, if the premises are correct, it does not follow that the mortgage has ever been extinguished as to the assignee. If the owners of the notes were in equity the owners of the mortgage, by proving their notes as unsecured debts their lien was transferred to the assignee. When the assignee's title vested in the real estate of the bankrupts, the land mortgaged was, as between the assignee and the owners of the mortgage, the primary fund for the payment of the mortgage debt. The owners of the mortgage had no right to call on the general estate in bankruptcy for the payment of the mortgage debt; they could not be admitted as creditors, except for the balance of their debt after deducting the value of their lien. This being so, if the assignee, instead of permitting the owners of the notes to prove them against the general estate, had taken the funds in his hands and paid the holders of the notes in full, he would not have thereby extinguished the mortgage, but the payment would have been deemed in equity a purchase. The general estate, being secondarily liable, would have been substituted in equity to the mortgage security, when its funds were appropriated to the payment of the mortgage debt, for which, as against the general creditors, the land was the primary fund. Where, as in the present case, the payment was not voluntary by the assignee, equity imperatively demands that he should be substituted in the security held by

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the owners of the notes. The owners of the notes having two funds—the mortgaged property and the estate in bankruptcy—while the general creditors, whom the assignee represents, had but one, have resorted exclusively to that one to which alone the assignee could resort; and upon familiar doctrine in such case the latter is entitled to be substituted in the rights of the former, and the mortgage is deemed alive for all the purposes of the assignee's protection. *Hunt v. Townsend*, 4 Sand. Ch., 510; *Besley v. Lawrence*, 11 Paige, 581; *Eddy v. Traver*, 6 Paige, 521.

I have thus far considered the question without reference to the cases which hold, that by the terms of the Bankrupt Act, when a secured debtor proves his debt as unsecured, such proof operates as a relinquishment of the security to the assignee. Without questioning the correctness of these decisions, I prefer to rest my conclusions upon the general principles of equity jurisprudence, which are applied, in all their vigor, in the marshaling of assets and the administration of estates in bankruptcy. If, at the time the real estate was sold, the assignee was the equitable owner of the mortgage to the extent that the holders of the notes would have owned it if they had not proved their notes, Comstock was certainly the owner of any remaining interest in the mortgage. The mortgage then was an existing security to the full extent of the mortgage debt. The sale did not change the rights of the parties; it merely transformed the land into money, leaving the rights of all parties precisely as they were before. The lien of the mortgage being the first on the land became the first on the fund, and the rights of the defendants do not attach to it, until enough has been realized from it to satisfy the mortgage. As it is conceded that only about seventy thousand dollars was realized from the sale of the real estate in bankruptcy, while the paper for which the mortgage was security, and on which Comstock was charged as indorser, was of larger amount, it follows that the defendants have no interest in the land covered by the mortgage to be enforced as a lien upon the general fund.

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Third. It remains to determine whether certain real estate not covered by the Comstock mortgage was subject to dower interests of the defendants. It is insisted for complainant, that this real estate was partnership assets of the bankrupts, and inasmuch as the partnership accounts and debts have never been settled, no dower interests have attached. Jaycox & Green became partners in 1851 as dealers in merchandise. In 1853-4 they purchased jointly the real estate in question now, taking conveyances upon the face to themselves as tenants in common. Of this real estate one portion was purchased partly with individual funds, and partly with funds of the firm; it was bought upon speculation, to be subdivided and sold; money was advanced from firm funds to purchasers for the building of houses; the proceeds of sales were paid into the funds of the firm, and used in their business, and any losses that might occur were to be sustained by firm funds; a large portion of this is now held under contracts by purchasers, for which deeds have not been executed. Another portion was purchased to secure a debt owing to the firm, the firm paying its funds for the remaining consideration money. After these purchases, the firm was reorganized by the introduction of new members, at which time the assets of the new firm were inventoried, and the real estate was not included in the inventory. Moneys received from sales and for rent of the real estate were paid into the new firm, and credited on the books to the old firm. None of the real estate now under consideration was used in the mercantile business of the original firm, or of the new firm. The second firm was reorganized, and a third formed, and this was reorganized, and a fourth formed; during these changes Jaycox & Green remained members of each firm, and at the dissolution of the fourth firm its assets were transferred to them, and they continued sole partners until their bankruptcy. The debts of each firm, except those of the bankrupt firm, have been paid in full. It does not appear whether or not the accounts of the partners have been paid, or adjusted as between themselves.

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Upon these facts, which are all that I deem material, the question arises whether the real estate was, at any time, partnership assets ; and if so, whether it has, at any time, ceased to be such, so that the dower rights of the wives attached. Where real estate is purchased by partners with partnership funds, from the moment of its acquisition it is impressed with the trusts created by the intention of the parties in respect to the purchase ; and will be regarded, in equity, as realty, or as personalty, according to the intention of the purchasers. If the purchasers intended that the real estate should be used or held for the purposes of the partnership, it will be deemed in equity partnership assets. The intent may be implied from the subsequent acts of the parties in regard to the subject of the purchase. And it will be presumed that the parties intended to treat the real estate as partnership assets, if it was subsequently subjected to the uses of the partnership business. But, according to the weight of authority, the mere fact that the purchase was made with firm funds will not render the land partnership property ; but such a purchase will simply give rise to a resulting trust, under which the parties will *prima facie* take equal moieties, unless it appears that they contributed unequally to the consideration. These propositions are clear upon the authorities.

But this case presents a feature which is exceptional, and a question which is not clear upon the authorities. The real estate, though purchased with the funds of the firm, was not purchased for the mercantile business of the partners ; but it was purchased as a speculation, in which the capital was to be derived from, and the losses were to be sustained by, the assets of the mercantile firm, and the profits which might accrue were to augment the capital of the mercantile firm. Is not the intent of the partners to consider the real estate partnership assets, as clearly to be implied from these facts, as it would be if it appeared that subsequent to the purchase they used the real estate corporeally for partnership purposes ? I think it is.

Were it not for the statute of frauds, it would be compe-

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tent for the parties to a purchase of real estate, to impress the real estate with any trust as to its disposition which they might desire, and to do so by parol agreement. The doctrine of resulting trusts is invoked to escape the operation of the statute, where the purchase is made with joint funds; in which case, as the trust is implied, it is not within those which by the statute must be declared or manifested in writing; and it may be shown by parol. Suppose a case, then, where two contribute in equal proportions to a purchase of real estate, upon the verbal agreement that it shall be sold and the proceeds invested in a mercantile business in which the parties are engaged, and subjected to the losses that may arise in that business. Is there any reason, when the trust arises by the investment of joint funds, and may be shown by parol proof, why the extent and incidents of the trust may not also be shown by parol? Where a mercantile firm purchases for mercantile uses, it is competent to show by parol the interests of the respective partners, and the state of the firm indebtedness, in order to define the extent of the trust which such a purchase impresses on the land. If the objection, in the case supposed, rests upon the interdiction of the statute of frauds, it would equally apply in the case of a purchase by a mercantile firm. As said in the note to *Dyer v. Dyer*, 1 Leading Cases in Equity, p. 282: "When it is once settled that payment of the purchase money raises an equity and a trust which override the deed, the practice in reason and conscience ought to be, to admit all legal evidence that can explain, define, and determine the equity." If such evidence is competent, then the proof here that the parties purchased the real estate in question to deal with it as a commodity, and to subject its proceeds to the contingencies of their mercantile business, fastened a trust upon the real estate commensurate with that intention. And upon principle, where two persons purchase real estate with joint funds, intending to deal with it as a commodity, and to share the profits or loss which may arise after it is converted into money, they are partners as to the transaction, and their in-

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tention to treat the real estate as personalty, converts it into personalty in equity, until the purposes of the partnership have been fulfilled. By the statutes of this State relating to trusts, an implied trust is not permitted to arise from the payment of joint funds, where, by the agreement of the parties, the conveyance is taken in the name of one of them only; but, with this exception, there is no reason why equity should not enforce the intention of joint purchasers with joint funds to deal with the real estate purchased as personalty, and impress upon it the partnership trusts which the parties contemplated. The cases of *Ludlow v. Cooper*, 4 Ohio St. 1, and *Kramer v. Arthurs*, 7 Barr, 165, countenance this conclusion.

These views must control the rights of the parties as to that portion of the real estate in question which was purchased in part with individual funds, and in part with the firm funds of the bankrupts, upon speculation, to be subdivided, sold, and the profits or losses divided between them. As it was not used, or designed to be used, for their mercantile business, the fact that it was bought in part with individual and in part with firm funds, would not, according to the weight of authority, in the absence of other evidence, imply their intention to consider it as firm assets. But their intention to deal with it as personalty, and as partners, is clearly established; and this court must regard it as personalty until the satisfaction of all the trusts which have been impressed upon it.

As to that portion of the other real estate, which was purchased in part to secure a firm debt, and in part with firm funds, upon the authority of *Buchan v. Sumner*, 2 Barb. Ch., 165, which is approved in *Collumb v. Read*, 24 N. Y., 505, I should have no hesitation in holding it to be partnership property, were it not that here the firm debt was but a part of the consideration, and not the whole, as in *Buchan v. Sumner*; and the payment of the balance with firm funds, in the absence of any intent to use the land for the mercantile business, of itself would not indicate the intent of the purchasers

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to constitute it partnership assets. It appears, however, that the rent received from this real estate was credited in the firm accounts in the same manner that moneys arising from the mercantile debts of the original firm were credited; and in view of the fact that real estate speculations of the firm were frequent and extensive, it may fairly be assumed that they regarded themselves as partners in all the transactions where they purchased together.

As the real estate in question was impressed with the character of personalty, the onus is on the party who alleges that it has lost that character, to show, not only that the creditors of the partners have been paid, but that as between themselves the accounts of the partners have been settled. Until this has been done the land remains partnership assets. *Dyer v. Clark*, 46 Mass., 562; *Goodburn v. Stevens*, 1 Md. Ch., 420; *Tillinghast v. Champlin*, 4 R. I., 173-207; *Buchan v. Sumner*, 2 Barb. Ch., 165. If it appeared that the accounts between the partners had been satisfied, the real estate would have resumed its original character as realty, and the dower interests of defendants would have attached; and the debts of the new firm could not be satisfied from the real estate to the prejudice of the dower interests.

It only remains to consider the rights of the defendants as to the real estate described in schedule "I," annexed to the bill. As to this, there is nothing to show that it was to be held by the bankrupts otherwise than as tenants in common with Allen Munroe; it does not appear that it was purchased with joint funds, and the defendants' dower interests attached to it.

A decree is directed, that the defendants have neither of them any claim against the bankrupt estate, or any lien on the fund in the hands of the assignee, aside from the value of their respective dower interests in the real estate described in schedule "I," annexed to the bill. And it is referred to D. F. Gott, Esq., Register in Bankruptcy, as master *pro hac vice*, to compute and report the sum due defendants by reason of such interests. Upon the coming in of his re-

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port, the decree will be settled upon three days' notice by either party, and the question of costs is reserved until that time.

UNITED STATES DISTRICT COURT—INDIANA.

Congress may pass exemption laws, impairing the obligation of contracts. A bankrupt is entitled to an exemption of household and kitchen furniture, and other articles and necessities, although the same were taken under an execution levied before the commencement of the proceedings in bankruptcy.

Under the laws of Indiana, a bankrupt is not entitled to an exemption against a judgment for damages in an action of replevin or for costs.

In re JOHN OWENS.

GRESHAM, J.—Jesse A. Mitchell and Alexander Reid brought an action of replevin, in the Lawrence Circuit Court, against John Owens, to recover possession of certain personal property. The property was delivered to the plaintiffs, on their executing the usual bond, and on the 18th day of February, 1874, the cause was tried, and the court found that the title to the property was in the plaintiffs, and gave them judgment for one cent damages for its unlawful detention, and twelve hundred and sixteen dollars for costs. On the 26th day of October, 1874, an execution issued on this judgment, which, at 9 o'clock in the forenoon of the same day, came into the hands of the sheriff, and at 3 o'clock in the afternoon of the same day, was levied upon all the property of the defendant. At 7 o'clock in the afternoon of the same day John Owens filed his petition in bankruptcy, upon which he was adjudged a voluntary bankrupt before Register Butler. Subsequently, upon a proper showing, the sheriff was enjoined from proceeding to sell said property so levied upon, and the same was restored to the possession of the said John Owens upon his executing the proper bond. Afterwards, part of this property, amounting to four hundred

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and ninety-eight dollars, was set apart and exempted to the said John Owens, under the five hundred dollar clause of Section 14 of the act, and another part of the same property, of the value of three hundred dollars, was also set apart as exempt from sale on execution by the laws of this State. During all this time, the said John Owens was, and still is, a resident householder of Indiana.

Section 413 of the Indiana code enacts, that when an execution against the property of any person is delivered to an officer to be executed, the goods and chattels of such person, within the jurisdiction of the officer, shall be bound from the time of delivery. 2 G. & H., p. 232.

Section 22, of Article 1, of the Constitution of Indiana, reads as follows: "The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted."

To carry this provision of the Constitution into effect, the Legislature passed an act, the first section of which reads as follows:

"That an amount of property, not exceeding in value three hundred dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process from any court, for any debt growing out of or founded upon a contract, express or implied, after the 4th day of July, 1852." 2 G. & H., p. 368.

It is claimed that under this statement of facts, the exemptions made by the assignee were unauthorized. The household and kitchen furniture, and other articles and necessities set apart to Owens were not unreasonable, if he was entitled to an exemption under the five hundred dollar clause of the act.

Laws exempting reasonable portions of the debtor's property from execution and sale, properly relate to the remedy, and are therefore liable to no constitutional objection. *Bronson v. Kinzie*, 1 How., 311. It would be difficult, at

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this age of the world, to find a civilized community without such regulations. Sometimes more is exempted, sometimes less, according to prevailing ideas of policy and humanity.

Each State may enact such reasonable laws as it sees fit, regulating the remedy on contracts in its own courts. A State may not, however, render the remedy valueless by exemptions having no reference to the nature and amount of the debtor's property, or by burdening it with conditions and restrictions. Such laws would be held to violate that part of Section 10, Article 1, of the Constitution of the United States, which prohibits to the States the power to enact laws impairing the obligation of contracts. *Bronson v. Kinzie, supra*; *Greene v. Biddle*, 8 Wheat., 1. But it has been repeatedly held, that there is nothing in the Constitution of the United States which forbids Congress to pass laws impairing the obligation of contracts, although that power is denied to the States. And it is no longer controverted, that Congress may, by the enactment of a uniform Bankrupt Law, discharge debtors entirely from the obligations of their contracts. The Constitution having conferred the power to enact such laws, it is in the discretion of Congress to exempt such portions and kinds of the debtor's property, as may be thought necessary to protect him and his family from want and distress. And regulations of this kind may be modified from time to time, as experience demonstrates the necessity for change, and these modifications made applicable alike to past and future contracts, and rights already vested, as well as those to vest in the future. It must therefore be held, that when a creditor acquires rights, as by judgment or execution liens, such as are claimed in this instance, he does so, knowing that the privilege of the debtor to claim the exemptions allowed by the statute, remained unimpaired, in the event of his being adjudged a bankrupt.

As to the other branch of the case, it is clear that the statute of the State allows no exemption against a debt or demand not growing out of contract. Against a judgment for

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damages, in an action of replevin, it is equally clear that the benefit of the statute cannot be claimed. The question arises then, Do the costs partake of the nature of the judgment as a mere incident? At common law, no costs were allowed to either party. The statute allows the prevailing party to recover his own costs, on the theory that he has already paid them. But each party is ultimately liable to the officers and witnesses for such costs as he makes, and, if he is not required to pay as he goes, it is on an implied assumpsit that he will pay his own costs if he does not succeed in the action, or if he succeeds and his adversary is not good for them. Thus far, it would seem that costs are "a debt growing out of or founded on contract." But I am unable to see on what ground the unsuccessful party can be said to have promised to pay the costs of his adversary. It is sometimes the case, that, after a return of *nulla bona* on an execution against the unsuccessful party in an action of tort, a fee bill issues against the prevailing party for his own costs. In such a case, I can see no good reason why the benefit of the statute might not be claimed against a fee bill thus issued as "final process from a court, for a debt growing out of or founded on a contract." I have not been able to find a ruling of the Supreme Court of Indiana on this question.

I think Owens is entitled to the four hundred and ninety-eight dollars' worth of property set apart to him as above stated, notwithstanding the lien of the execution had attached before the proceedings in bankruptcy were commenced. He is also entitled to the other items, amounting to three hundred dollars, exempted him under the statute of the State, if there is anything left of his property after paying the costs made by the plaintiffs.

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UNITED STATES DISTRICT COURT—INDIANA.

The debt of a creditor is barred by a discharge, although his name was not placed on the schedule, and he received no notice of the proceeding in bankruptcy, or of the petition for a discharge.

WILMER S. LAMB, Assignee of the Winneshiek Insurance Company, v. ISAAC A. BROWN.

GRESHAM, J.—This is an action of assumpsit on a premium note given to the Winneshiek Insurance Company on the 8th day of October, 1862, now in bankruptcy.

The defendant pleaded that on the 28th day of April, 1868, he was discharged from all debts which, by the terms of the Bankrupt Act, were provable against his estate.

To this plea there was a replication, that the defendant omitted from the schedules filed with his voluntary petition, the debt described in the declaration, and that neither the plaintiff nor the said Winneshiek Insurance Company had notice of the defendant's proceeding in bankruptcy, or of his petition for discharge.

There was a general demurrer to the replication.

It was not alleged in the replication that the omission was willful or fraudulent, and it is not pretended that the discharge was improperly granted, or that the same is invalid for any of the causes specified in Section 29 of the act.

The simple question raised is whether a debt, inadvertently omitted from the schedule, with no fraudulent intention on the part of the bankrupt, remains unimpaired by the discharge, provided the creditor has received no notice either of the pendency of the proceedings, as required by Section 11 of the act, or of the application of the bankrupt for his discharge as required by Section 29.

The discharge, with the exception of debts created by fraud, defalcation in a public office, or arising under some fiduciary relation, "releases the bankrupt from all debts, claims, liabilities, and demands which were, or might have

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been proved against his estate." I think Congress intended that a discharge granted in a proceeding either voluntary or involuntary, after an order of adjudication upon a proper petition, and after the service of the usual notices and publication required by law, shall operate as a complete extinguishment of all debts of the bankrupt provable against his estate, with the exceptions named in this act—debts of those whose names have been omitted from the schedules otherwise than fraudulently, and who have received no notice of the pendency of the proceedings, or of the application for a discharge, as well as the demands of those who have proved their claims and have received all the notices prescribed by the act and by the rules of the Supreme Court. *Symonds v. Barnes*, 6 N. B. R., 377; *Payne v. Able*, 4 N. B. R., 220; *In re Archenbraun*, 11 N. B. R., 149.

The jurisdiction of the bankruptcy court having once attached, it is complete for all purposes of the act. Jurisdiction to grant a discharge is not made dependent upon the correctness of the schedules. In fact it is known by all who have had experience in bankruptcy practice, that many schedules are incomplete, especially the schedules of debts.

The 11th Section of the act makes it the duty of the marshal to serve written or printed notices on all creditors whose names appear on the schedules, or whose names may be given in addition by the debtor; and Section 4 provides, in involuntary cases, that if the bankrupt is absent, or cannot be found, the schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain. It is evident, therefore, that the act does not contemplate complete schedules in all cases, and yet it declares that the discharge shall release the bankrupt from all debts, etc., which were, or might have been proved against his estate.

Ample provision is made by Section 29, for defeating the granting of a discharge, and if the creditors fail to avail themselves of that right, the 34th Section authorizes any

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creditor whose debt was proved or provable to contest the validity of a discharge on the ground that it was fraudulently obtained.

Perhaps a discharge once obtained will stand until annulled for fraud in a direct proceeding.

The demurrer to the replication is sustained.

SUPREME COURT—MAINE.

If the bankrupt's counsel fails to appear for him in an action, because by mistake he supposed that the counsel for a co-defendant also appeared for the bankrupt, a review of a judgment by default entered against the bankrupt may be granted, so that he may plead a discharge.

SYLVAN SHURTLEFF v. BENJAMIN F. THOMPSON.

On report.

Petition for review of an action of assumpsit, brought by Mr. Thompson against Alvah and Sylvan Shurtleff. The presiding justice found and reported the following facts, upon which judgment is to be entered according to the rights of the parties, viz.: That William L. Putnam, Esq., was retained as the attorney of Sylvan Shurtleff in his application to the District Court of the United States for the benefit of the Bankrupt Act, as well as in the action now sought to be reviewed. The petition in bankruptcy was filed August 24, 1870, and the writ in the suit of Thompson against the Shurtleffs was entered at the February Term, 1871, of the Superior Court. The petitioner handed the summons in that case served upon him, to his said counsel, who did not appear therein, however, because he saw that Howard & Cleaves had entered a general appearance, these gentlemen having been employed by Alvah Shurtleff, and not by this petitioner. At the March Term, 1871, the plaintiff discontinued as to Alvah Shurtleff, and Sylvan was defaulted. He had no knowledge of this, or that Mr. Putnam did not appear for

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him in that suit, till August 10, 1872, when he was arrested upon an *alias* execution issued upon the judgment rendered therein. To obtain his release from this arrest, he gave the statute six months' bond, but performed none of its conditions, and an action is pending upon it. Sylvan Shurtleff obtained his discharge in bankruptcy, July 15, 1871. He expected and intended that Mr. Putnam would suggest his bankruptcy and plead the discharge in Mr. Thompson's suit, which was upon a claim provable in bankruptcy, being for goods delivered by the plaintiff in that case upon orders drawn by S. Shurtleff, in the name of the firm of A. & S. Shurtleff. While that cause was pending, this petitioner consulted Judge Howard about it, who procured these orders of Mr. Thompson's counsel, in order to show them to Sylvan Shurtleff.

Howard & Cleaves, for the petitioner.

Bankruptcy and his discharge were a perfect defense, which Mr. Shurtleff was entitled to and intended to make; but was deprived of it by accident and mistake, without consent, knowledge, or fault on his part. This entitles him to a review of that action.

J. O'Donnell, for the respondent.

The burden is on the petitioner to show due diligence, which he fails to do. This respondent only pursued his claim regularly, and tried to enforce it. He sued the firm of A. & S. Shurtleff. Howard & Cleaves appeared generally, and filed joint pleadings, not as attorneys for either individually. The action was tried in due course, and resulted in a discontinuance as to Alvah Shurtleff, and judgment against Sylvan, on the ground that their firm was dissolved long before the goods were sold by the plaintiff, the use by Sylvan of the firm's name in the orders for them being unauthorized and fraudulent. Should such a creditor suffer, then, because Mr. Putnam did not see fit to appear, but (as well as his client) acquiesced in and ratified the general appearance of Howard & Cleaves? (*Crocker v. Randall*, 53 Maine, 355.) By consenting to a default, and allowing us to take judgment, Sylvan Shurtleff prevented our proving our claim in bank-

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ruptcy, since it was merged in the judgment of a date subsequent to the 24th day of August, 1870. (*Sampson v. Clark*, 56 Mass., 173; *Bradford v. Rice*, 102 Mass., 472; *Woodbury v. Perkins*, 59 Mass., 86.) The review would only create an annoyance in the action upon the bond, which virtually satisfied the judgment. (*Sturdivant v. Greeley*, 4 Me., 535; *Brown v. Brigham*, 87 Mass., 582.)

Rescript.

At the March Term, 1871, of the Superior Court, the petitioner, one of the defendants in the original action, was defaulted without appearance. He intended to appear by counsel which he had previously retained for that purpose.

He had a full, legal defense; but his counsel failed to appear and make it, for the reason that the latter mistakenly supposed that the petitioner's co-defendant's counsel also appeared for the petitioner.

Held that a review be granted.

UNITED STATES CIRCUIT COURT—S. D. NEW YORK.

A claim of the United States against bankrupts to recover as a penalty the value of goods imported and entered contrary to law, is a provable debt against the estate of the bankrupts.

DEMAS BARNES, Assignee of *Theodore H. and Bernard T. Vetterlein*, v. *THE UNITED STATES*.

On appeal from the District Court.

F. N. Bangs, for appellant.

Thomas Simons, for respondent.

HUNT, J.—*First*. I see no reason to doubt that the debt of the United States was provable under Section 19 of the Bankrupt Act.

The goods had become forfeited for violation of the revenue laws, and the statute gave the United States an action

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to recover their value. This right had been put in force by the commencement of an action to recover such value before the proceedings in bankruptcy were commenced.

The statute says that "all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy . . . may be proved against the estate of the bankrupt."

That an admitted right to recover from the bankrupts in an action at law the value of certain goods, which value is offered to be proved by witnesses, constitutes a debt against the bankrupts, is reasonably certain. Whether the debt arises from a promise to pay, or whether it arises from a duty or obligation to pay is not important. *In re Rosey*, 8 N. B. R., 509; *Stockwell v. United States*, 13 Wall., 531, where the point is expressly decided by the Supreme Court; *Bayley v. New York Central R. R.*, not reported. *Chaffee v. United States*, 18 Wall., 516; 2 Hill, 220; 2 Black. Com., 153, 160, book 3, ch. 9.

Second. I do not discuss the question whether the judgment recovered against the bankrupts was evidence of the indebtedness. If it was a valid judgment it should be held to afford competent evidence of the debt. If it was not, it must be held in these proceedings as no judgment, and the parties must stand as if there were no judgment in existence. In the latter event the claimant must establish his debt by proof upon the merits. This was done in the present case, by evidence obtained from the books and papers of the bankrupt, which came in possession of the collector by virtue of a warrant issued by the district judge. It will not do for the assignee to say that the judgment is forbidden by law to be recovered—that it is no judgment and affords no proof of the existence of the debt; and to say also that it is a good-enough judgment to merge the original claim, and prevent proof thereof by the owner. He cannot thus blow hot and cold with the same breath.

Third. It is objected that evidence taken from the bankrupt's books, which had been seized under the act of 1867,

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was improperly admitted. Waiving the suggestion that this objection was not taken on the trial, and waiving the question whether the objection, if good, is available to an assignee, it is sufficient to say that I have carefully examined this subject in the case of *Hughes & Co. v. United States*, and have reached the conclusion that the objection is not tenable. The act of 1868, which, it is supposed, will exclude this evidence, applies only to the evidence derived from a personal examination of a party or witness—not to evidence found in books and papers, and which may have been obtained under the statute referred to. My opinion on that subject is on file in the Clerk's office of the Southern District of New York, and I refer to it for a more full expression of my views.

The order must be affirmed.

In re Bowne & Ten Eyck.

UNITED STATES DISTRICT COURT—NEW JERSEY.

If a note taken for rent is not paid at maturity the landlord is entitled to all his remedies for the security or collection of his claim, in the same manner as if the note had never been given.

If a tenant makes an assignment for the benefit of creditors to a trustee who sells the goods on the premises after the commencement of the proceedings in bankruptcy, and turns the proceeds over to the assignee, the landlord is entitled to payment of the rent out of the proceeds.

In re BOWNE & TEN EYCK.

W. S. Dayton, for landlord.

James Buchanan, for assignee.

NIXON, J.—John F. Klein has filed his proof of claim against the bankrupt's estate for two hundred and ninety dollars, alleged to be due to him on account of two months' rent ending July 28, 1874, for the premises occupied by the bankrupts at the time of the adjudication of bankruptcy. He claims that he is entitled to be paid in full, out of the proceeds of the sale of the chattels which were in the demised premises at the date of the filing of the petition.

The evidence reveals this state of facts: The bankrupt rented of the claimant the two stores Nos. 27 and 27½ East State Street, at the annual rental of two thousand dollars, payable monthly. On the 28th of July, 1874, he took the promissory note of his tenants, payable three months after date, at the First National Bank of Trenton, for two hundred and ninety dollars, on account of the rent for the months of June and July, that sum being the balance acknowledged to be due after allowing for all cash payments previously made thereon. The note matured on the 31st day of October, and was duly protested for non-payment at the close of banking hours on that day. On the morning of the same day, about 10 or 11 o'clock, the claimant caused a distress warrant to be issued, for three hundred and thirty-three dollars and thirty-three cents, the two months' rent due for August and September. A few days afterwards—it does not clearly appear when—the

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debtors made an assignment of all their estate, under the State law, to one Charles W. Street for the equal benefit of all their creditors. Mr. Street entered upon the possession of the property, being a stock of goods in a gentlemen's furnishing store, of the value of about five thousand dollars, and began to make sale of them as assignee. Before any considerable quantity was disposed of, to wit: on the 9th day of November, 1874, a petition in bankruptcy was filed against Bowne & Ten Eyck, and, on the 10th, an injunction was issued, specifically restraining them, and the Sheriff of the county of Mercer, from disposing of or in any manner interfering with the property of the alleged bankrupt. The assignee, Street, was not named in the injunction, nor does it appear from the marshal's return that it was served upon him. Bowne & Ten Eyck were duly adjudged bankrupts on the 24th of November, when a warrant was put into the hands of the marshal, who, on the next day, took charge of the bankrupts' estate. He did not interfere, however, with the proceeding of Mr. Street, the assignee under the State law, who seems, with the tacit acquiescence or understanding of all the parties, to have retained the control of the goods, and to have continued their sale until the whole was converted into money. The assignee in bankruptcy, Yard, was appointed on the 29th of December, and the proceeds of the sale, amounting to upwards of five thousand dollars, were paid over to him by Mr. Street.

No serious question is raised but that the bankrupt estate owes the amount claimed for rent. It is true that the landlord took the tenants' note for it, and gave a receipt in full. But the note was never paid, and is still in the hands of the claimant ready to be surrendered, and hence the debt it was given to pay remains due and owing (2 Gr. Ev., § 520; *Burden v. Halton*, 4 Bing., 454; *Holmes v. DeCamp*, 1 Johns., 33), and the payee is entitled to all his remedies for the security or the collection of the debt, in the same manner as if the note had never been given. (*Edwards v. Derrickson*, 28 N. J., 39.)

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Has the landlord lost his right to claim a lien on the goods and chattels on the premises for payment of the same?

This question must be answered in the affirmative, unless there are some provisions of the Bankrupt Act which justify or protect the landlord in his inaction or acquiescence in the sale of the property by the assignee.

A right to distrain for the rent in arrear arose to the landlord, on the 31st of October, after the maturity and protest of the note which had been given for its payment. The assignment of the property to Street, by the debtors, did not take away this right, as long as it remained on the demised premises. *Haskins et al. v. Paul*, 9 N. J., 110. But if the landlord stood by and saw the assignee make a sale of the goods and chattels from day to day, to *bona fide* purchasers, without protest or interference, he could not afterwards claim a lien upon the proceeds of sale, nor a right to distrain upon the property after sale and removal. Nix. Dig., Title Distress, Section 11. But it has long been held that by the clear provisions of the Bankrupt Act, the assignee in bankruptcy takes the property in the same plight in which it was held by the bankrupt when the petition was filed, subject to all the liens and incumbrances that would have affected it if no adjudication in bankruptcy had taken place.

The petition in this case was filed November 9, 1874. The great bulk of the goods and chattels was then on the premises, in the hands of the assignee, Street, and subject to the landlord's lien.

The counsel for the assignee insisted on the argument that the landlord has no lien on his tenant's goods for rent due until after the levy of the distress warrant. This is only true in the sense that he cannot follow the property in the hands of a *bona fide* purchaser without notice of his claim. It is a general proposition that, whenever the law gives to a creditor the right to have his debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of the debt.

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The whole question here involved was fully discussed and settled by Ch. J. Chase, *In re Wynne*, 4 N. B. R., 23.

"As we understand the Bankrupt Act," he says, "all the rights and all the duties of the bankrupt, in respect to whatever property, not expressly excluded from the operation of the act, he may hold, under whatever title, whether legal or equitable, and however encumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced *by any proceeding in a State court commenced after petition is filed.*" * * * "Whether, therefore, the distress warrant or the attachment be regarded as a proceeding for obtaining or enforcing a lien, each was equally unwarranted. If a lien for rent existed, it was a lien to be discharged by the assignee, and enforced in the United States Court of Bankruptcy."

He then quotes the 12th Section of the 128th Chapter of the Revised Code of Virginia, forbidding all persons claiming an interest in goods from removing them from the demised premises, without paying to the landlord the rent due, etc., not exceeding one year—substantially similar to the 4th Section of the Landlord and Tenant Act of New Jersey—and adds: "We cannot doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character."

Under the authority of that case, and upon principle, I am of the opinion that the landlord, upon the facts proved, is entitled to the payment of his claim as a secured debt, and it is ordered accordingly.

In re Mendelsohn.

UNITED STATES DISTRICT COURT—CALIFORNIA.

An attaching creditor may intervene and oppose an adjudication in involuntary bankruptcy.

The fact that the petitioning creditor and the debtor are brothers, warrants the court in scrutinizing the claim closely, but not in inferring fraud from it alone.

The omission to place a claim upon a list of creditors is merely a circumstance of suspicion.

An assignment is an act of bankruptcy, although it is so defective that it is void under the State laws.

In re S. MENDELSON.

Marcus Rosenthal, for petitioning creditor.

F. G. Newlands, for intervening creditors.

HILLYER, J.—D. Mendelsohn filed his petition, praying an adjudication of bankruptcy against S. Mendelsohn. On the return day of the order to show cause, the alleged bankrupt, S. Mendelsohn, did not appear, and, on motion, default was entered, and thereupon an adjudication was asked for. At this stage of the proceedings certain creditors appeared, and asked leave to intervene and contest the facts in the petition. They show in their petition that they are creditors, and have a lien, by attachment, on the goods of the debtor; that the proceeding for adjudication is collusive and fraudulent, and the alleged debt of the petitioning creditor a sham.

The petitioning creditor objected to their being allowed to contest his petition, because the case is, so far, between himself and the debtor, and other creditors have no right to be heard at this point of the proceedings.

The question being one of considerable importance, a decision of it was reserved, and testimony taken *de bene esse*, and the whole case submitted.

First, then, as to the right of these creditors to intervene and oppose the adjudication at this time. That they have a direct interest in opposing the adjudication is very plain. They have attached the debtor's property, and if proceedings in bankruptcy do not go forward they will have a lien for their security. If, however, there is an adjudication and an

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assignment, their attachment will be dissolved, and their right even to sue and obtain judgment suspended. After adjudication, it has been settled in this court, that attaching creditors may move to set it aside; that they have an interest in and a clear right to be heard and resist the proceedings on the ground that the court is without jurisdiction. *Fogerty v. Gerrity*, 4 N. B. R., 451; 1 Saw., 233. It was also held in that case that all other creditors are parties to and bound by the proceedings, so that, although neither the petitioning creditor nor the debtor objected to the jurisdiction, that was not sufficient to confer jurisdiction, even if it could be so conferred.

It cannot well be maintained that there is no relief for attaching creditors in a case like the one at bar, *i. e.*, where the debt of the petitioning creditor is not a just debt, and yet the debtor, colluding with him, admits it, and consents to an adjudication. Courts of equity grant relief against decrees obtained by fraud, and annul the whole. Story, Equity Pl., Sec. 426. Fraud infects and corrupts the judgments of all courts. *Ib.*

In some form, then, it must be admitted that persons whose rights are injuriously affected by a fraudulent adjudication, may apply for and obtain relief. No court ought or can close its ears to their petition. The Bankrupt Law makes no provision in these cases for notice to the creditors in general, and the only necessary parties are the petitioning creditors and the debtor; yet this is no sound reason for denying the right to intervene upon good grounds being shown, such as collusion and fraud on the part of the original parties to the proceeding.

The question, then, is really reduced to one of practice, and, to my mind, it is, in every aspect of the case, better to allow the attaching creditors to come in and be heard before the adjudication, than to wait until a decree is made, and then oblige them to impeach that for fraud, which, if allowed to be proved in the mode followed here, would have saved the necessity of any adjudication.

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I think, therefore, that on principle, these parties, having a direct interest in defeating an attempted fraud like the one set up, may and should be allowed to intervene for the protection of their interest.

I am aware that there have been decisions, which, at first blush, seem to be against the practice here adopted, but on examination most of them will be found not really so.

Thus, it has been said that the proceeding is like an ordinary action at law, and until adjudication, the petitioner and debtor are the only parties, and that no outside creditor has a right to resist the adjudication. *In re Bush*, 6 N. B. R., 179. But this was said in a case in which certain creditors applied to have the adjudication set aside, on the ground that a certain assignment had been made by the debtor for the benefit of his creditors, to which the petitioning creditor it seems was not a party, though he assented to the assignment. Now, in this case, the adjudication in bankruptcy did not have the effect to render unavailing this assignment; if valid, against the assignee, it could still be maintained against the assignee. No want of jurisdiction was alleged, nor fraud, nor collusion.

What was said by the learned judge about the right of creditors to intervene before adjudication was unnecessary to the decision.

In re Boston, Hartford and Erie R. R. Co., 5 N. B. R., 232, a motion was made by a creditor before adjudication for leave to defend against the petition. But the court said the question, before the adjudication at least, was between the debtor and the petitioning creditors, "with which no outside party, sustaining merely the relation of a person who claims to be a creditor of the debtor, can be allowed to interfere." No want of jurisdiction was alleged, no fraud or collusion. Nor does it appear that the direct effect of the adjudication and assignment would deprive the creditor of any security which he then had for his debt. He was, as the court says, a mere creditor, with no other claim to be heard.

On the whole, then, the right of the attaching creditors to

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appear and oppose the adjudication on the grounds alleged cannot properly be denied them, and they must be heard.

Of course, what has been said is not meant to convey the idea that the fact that a creditor has an attachment lien is of itself any ground for denying the adjudication; it only gives him a right to be heard. If there is no fraud or want of jurisdiction, the fact that the adjudication will dissolve his lien is no ground for its denial.

And first, it is denied that the debt of the petitioning creditor is valid and just. The evidence for petitioning creditor is that the debt is made of two items, as follows: In 1873 the petitioning creditor was in partnership with J. Zacharias and his brother; the debtor bought goods of the firm. When the firm was dissolved, the petitioning creditor was charged and his brother credited on the firm books with the balance due, four hundred dollars; fifty dollars was paid on this in January, 1874, leaving three hundred and fifty dollars balance due. Afterward the petitioning creditor formed a copartnership. Rub and the debtor bought of this firm goods to the amount of over one thousand dollars. When Mr. Wentenrich came in, in July, 1874, he refused to give credit to S. Mendelsohn, and the amount due Rub and D. Mendelsohn was charged and credited as before to the extent of D. M.'s profits, viz., four hundred and ninety-seven dollars and thirteen cents. The balance of the firm debt was afterwards paid by S. Mendelsohn. There is no doubt of the existence of the firms and the purchase of the goods by the debtor as stated. I see no good ground to say that settlements were not made as stated also, and the charges made to the petitioning creditor.

The only marks of suspicion are the fact that the debtor and petitioning creditor are brothers, and certain erasures on the ledger of Rub, Mendelsohn & Co. That the parties are brothers is a circumstance which warrants the court in scrutinizing the transaction closely, but not in inferring fraud from that alone. The clerk who made the entries swears they were made at the time they bear date, and explains the erasure,

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which was done by him. In the account, the whole amount due from S. M. to the firm had been charged to D. M. and credited to S. M. This was erased; and over it was written the amount agreed upon of D. M.'s profits, four hundred and ninety-seven dollars and thirteen cents. This was done, the clerk says, at the time it bears date.

No plausible motive is shown or suggested for a false entry of this kind at that time. The book of original entries was shown, and the items of the account against the debtor correspond. The balance due the firm was paid by S. M. through the clerk, S. Friedman. After the last balance of one hundred and two dollars was paid, which ignored the firm account, no more payments were made. He says that for nine months past he has not seen D. M. at the store of S. M. On the other hand, the debtor stated, as they say, to Stone and to Baum, that the list he gave them was all he owed, and the debt of D. M. was not on it. The debtor denies this, and it is shown that other creditors of his were not mentioned at the time. Of course, the failure of the debtor to state this debt to Stone and Baum is not proof that it did not exist, but merely a circumstance of suspicion, and a slight one, on the general charge of collusion and fraud.

There is not, in my mind, from the evidence, any doubt that the petitioning creditor's debt was *bona fide*, and arose as stated. There is no pretense of any motive for trumping up a debt of this kind in this way against his brother one and two years ago. It is an everyday thing for embarrassed debtors to conceal the true state of their affairs from creditors who are pressing for payment; they overstate their assets, and understate their debts. It seems to be true that for nine months before these proceedings were commenced these brothers had not spoken to each other. The actions of the debtor, during the three or four weeks preceding the petition, show nothing to indicate a fraudulent purpose. He undertook to pay seventy-five dollars a week for his larger creditors, and to pay off the small ones; he agrees to sign

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the assignment to Davis & Co., under a belief that it was, as they desired he should believe, a valid one; and finally attempts to settle at twenty-five cents on the dollar. It is hard to reconcile all this with the idea that he was meditating and arranging for a fraudulent bankruptcy proceeding at the time. The evidence for the petitioning creditor is that no part of his debts has been paid, and this is not contradicted. Friedman's evidence shows that the payments he made were on account of the firm debt, and not that of the petitioning creditor. Two acts of bankruptcy are alleged, and it is urged that neither has been proved.

The first is, that the debtor made an assignment of his property to Davis & Co., with intent to give a preference to one or more of his creditors, and to defeat or delay the operation of the act.

An assignment was, in fact, executed by the debtor to Davis & Co., purporting to be in trust for all his creditors. The facts are that Stone, the agent of Davis & Co., was pressing the debtor for payment of their claim, and procured the execution of the assignment with the understanding, as he says, that Mendelsohn should remain in possession of the goods, and carry on the business as before its execution; that on Monday of each week the debtor should pay seventy-five dollars, to be applied to the payment of creditors over one hundred dollars; that M. should pay the small creditors himself. The arrangement was so far acted on that some one hundred and fifty dollars were paid to Stone, which sum is now on deposit for the benefit of creditors entitled to it. When the debtor failed to make payment of the seventy-five dollars weekly, and told them he could not, he was told that the property in the store belonged to the assignee. Suit was afterwards begun, and the store and goods attached.

The weight of authority is decided, that even a fair general assignment for the benefit of creditors is an act of bankruptcy, because it necessarily defeats the operation of the act, and hinders and delays creditors. But it is void; this assignment was void, and cannot therefore be an act of bank-

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ruptcy. It is clear that under the code of California this was not a valid assignment.

The attaching creditors say that they knew from the first that it was void as an assignment, but sought to make the debtor believe it was valid, in order to use it as an instrument for collecting their debts. The debtor appears to have so believed, and admits it was made with a view to giving a preference to some of his creditors, and says he named six creditors to Stone, whom he wanted paid first. Stone, himself, objected to Shaffer & Co. being put on the list of creditors.

Admitting the assignment to have been so defective that it could not be enforced, it is, it seems to me, in this case, as much an act of bankruptcy as if it had been executed with all the forms.

Under the 39th Section "any conveyance or transfer with intent to prefer," is an act of bankruptcy. The assignment in this case, though an invalid one, was an attempt to transfer property with intent to prefer certain creditors named by the bankrupt. A construction of Section 39 is inadmissible which would permit a debtor to do that by means of an invalid instrument which he could not do by one properly executed.

The intent of the debtor to prefer, coupled with an attempt to do it, is enough to satisfy the act.

In this case there was more than an attempt. The debtor remained in possession of the goods, as he says, as agent of the assignees, and sold goods and paid over one hundred and fifty dollars to them in a period of about three weeks. If a debtor can do these things under an illegal document, and then set up the illegality in defense to proceedings in bankruptcy, it is easy to see how the act can be delayed and defeated.

Within the meaning of the law defining acts of bankruptcy, I think this was an assignment, and was made with the intent charged, so that on the whole case there must be an adjudication of bankruptcy as prayed.

In re Eldridge & Co.

UNITED STATES DISTRICT COURT—E. D. VIRGINIA.

The statute of limitations ceases to run against the creditor of a bankrupt at the commencement of the proceedings in bankruptcy, and, if not barred at that time his claim may be proved afterwards, though at the time of proof it would be otherwise barred.

The effect in bankruptcy of the petition, the adjudication and the assignment is to vest the assets in the assignee as a trust, against which the statute of limitations ceases to run.

The filing of the petition by a bankrupt and his including the claim of a creditor in the schedule of debts, is equivalent to a new promise, so as to prevent the claim, if not already barred, from being defeated by the statute of limitations.

A court of bankruptcy, like a court of equity, will respect State statutes of limitation, and apply them in cases in which they are properly applicable.

The proof of claim in bankruptcy is not a *suit*, the commencing of which is *per se* necessary to suspend the running of the statute of limitations.

In re M. ELDRIDGE & CO.

M. ELDRIDGE & Co., of Alexandria, were adjudicated bankrupts on the —th day of December, 1872. A debt of eight thousand six hundred and fifty-six dollars and fifty-eight cents was proved against them by Richard A. Hawes & Co., of Boston, on the 6th of March, 1875. This debt was contracted and was due in 1861, and was evidenced by certain notes and acceptances bearing date in that year. The assignee interposes the plea of the statute of limitations against this claim.

HUGHES, J.—It cannot now be doubted that the Federal Courts are bound to pay the same regard to the statutes of States limiting the time within which actions may be brought, as is paid them by the State courts. (11 Wheat., 361; 3 Pet., 270; 6 Pet., 291; 13 Pet., 45; 11 Wallace, 513; 11 Wall., 249; 11 Wall., 493; 6 Wall., 532; and also 1 U. S. Stat. at Large, 92, Section 34.)

It is equally well settled that courts of bankruptcy, like courts of equity, recognize statutes of limitations. (15 Ves., 478; 19 Ves., 468; 2 Rose, 59; 2 Glynn & J., 46; 1 Bing., 324; 8 Moore, 190; 7 Irish Ch. R., 284; 3 Deacon, 294; 34 Law Jour. U. S., 44; Kidd, 7 Jour. U. S., 613.)

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The only question, therefore, is, what is the limitation in Virginia, and whether the act ceases to run at the date of adjudication, or of the proof of the claim of Hawes & Co.

In Virginia, the statute of limitations did not run from July 26, 1861, until the 1st of January, 1869. Beginning to run at the latter date, if the adjudication in bankruptcy stops the running, then this claim of Hawes & Co. is not barred; whereas, if the statute runs until the proving of the debt, then this claim is barred, there having elapsed more than five years between the 1st of January, 1869, and the 6th of March, 1875.

Authorities were cited at bar (Bump's Bankruptcy, 566, 543, 8th edition; 6 N. B. R., 305) deciding that the proof of a claim is the beginning of a creditor's suit against an assignee; and, therefore, stops the running of the statute. The weight of authority, however, is greatly in favor of the proposition, that the petition in bankruptcy is the act which stops the running of the statute, it being a new promise, and the creation of a trust. As the question is one of importance, I will give the authorities on the subject.

That the statute of limitations did not run during the late war was decided by the Supreme Court of the United States in 6 Wall., 532; 9 Wall., 687; and 11 Wall., 508 and 9.

In Virginia, a stay law was enacted July 26, 1871, in which it was provided: "Nor shall the time during which this act is in force be computed in any case in which the statute of limitations may come in question." This act was renewed and extended, each time with this same provision, by the following acts, viz.: that of February 10, 1862; that of December 20, 1862; that of January 30, 1863; that of January 12, 1864; that of January 23, 1865; that of March 2, 1866; and by acts of 1866 and '67, ch. 297, it was extended to January 1, 1869.

The act of June 2, 1866, ch. 69, Section 7, provides that "The period during which this act shall remain in force shall be excluded from the computation of the time within which, by the operation of any statute, or rule of law, it may be

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necessary to commence any proceeding to preserve, or prevent the loss of, any right or remedy."

I believe it is a fact that there was no time during which the statute was running from July 26, 1861, until January 2, 1869. From that time to the petition in bankruptcy in this case was a period of less than five years.

"All debts *due and payable* from the bankrupt *at the time* of the adjudication in bankruptcy, may be proved. (Section 19, Bank. Act.)

"The statute of limitations does not run against a claim after commencement of the proceedings so as to prevent its proof, if it was not barred at the time the proceedings were commenced; but the claim may be proved after it otherwise would have been discharged." (Avery & Hobbs, 147; 48 Mass., 348; *Ex parte* Ross, 2 Glynn & Jam., 46-330.)

"It seems, that including a demand in the schedule of an insolvent's debts, is evidence of a new promise, if within the period of limitation." (*Bowie v. Henderson*, 6 Wheat., 514.) In this case, although it was held that the assignee, under the peculiar assignment which was under consideration, was not a trustee, and that recording the debt did not change its nature so as to make it a debt of record; yet the court say, "The effect of recording this debt was merely an admission of its existence, and not a change of its nature. It would have been sufficient evidence, if five years had not elapsed after recording, to have sustained an issue, on a replication of a new promise, to the plea of statute of limitations. But more than five years having elapsed, it could have no application in this case."

See also 3 Cow., 159 and 2 W. Blackstone, 702. In this last case the court say, "No objection can arise if the debt is not barred at the time the act of bankruptcy was committed."

A proceeding in bankruptcy is in the nature of a suit in which the bankrupt is plaintiff and all his creditors are defendants. (Bump on Bank., 8th ed., p. 374.) Debts may be proven at any time. (*Id.*, 77.)

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The meaning of the phrase sometimes used, that when the statute of limitations commences to run it never stops, notwithstanding disabilities of the parties, means, where the disability applies to the plaintiff. That is, if the plaintiff, once being free from disability, afterwards becomes disabled, as by marriage, death, bankruptcy, etc., it does not stop the running of the statute. A slight consideration will show that any other meaning is impossible.

The effect of going into bankruptcy is to promise to pay to all creditors *pro rata* to the extent of the assets, and to devote all assets to that purpose, in consideration of a discharge from further payment. This applies to all debts "due and payable" at the time. (*Minot v. Thacher et al.*, 48 Mass., 348.) Syllabus: "The statute of limitations does not run against a claim upon an insolvent debtor after the publication of the messenger's notice of the issuing of a warrant against the debtor, under St. 1838, ch. 163. A claim not barred by that statute, when such publication is made, may be proved at a meeting of the creditors held after it would otherwise have been barred."

The court say, Dewey J.: "The first objection to the allowance of the claims of the appellees is, that the same were barred by the statute of limitations. The position assumed by the assignees is, that though six years had not elapsed since the cause of action accrued, computing the time with reference to the publication of the proceedings in insolvency, and the appointment of the messenger to take possession of the effects of the insolvent, yet, as it had elapsed before the time of the meeting of the creditors at which the demands were presented, it is a good statute bar to these demands. It seems necessary only to state the proposition, to show that it cannot be sustained. By force and effect of the appointment of a messenger, and the publication thereof conformably to the statute, the property of the insolvent debtor is sequestered for the benefit of all the then existing creditors. After such publication, a suit by the creditor would be of no avail, as the property is all trans-

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ferred to an assignee, and the body of the debtor is to be discharged from arrest on execution. The debts presented for allowance against the insolvent are to be considered with reference to their validity at the date of the publication by the messenger. If they are found to be barred by the statute of limitations at that period, it would of course be competent for the assignees to object to their allowance, but not to compute the six years with reference to the time of the meeting of the creditors. A different rule would work manifest injustice. Take the case of a creditor, who has a debt that would be barred in thirty days. He knows that by law he has until the last of these thirty days to institute his suit, and intends so to do ; but in this state of things the debtor, upon his voluntary application, goes into insolvency under St. 1838, c. 163 ; the incipient proceedings are all regularly taken, but no meeting of the creditors is held for proving their debts, until thirty days have elapsed. Is the debt of this creditor to be regarded as barred by the statute of limitations ? Clearly not. But the principle contended for by the assignees would lead to that result in the case supposed."

This case also holds that, although the insolvent had, prior to proof, obtained his discharge, it makes no difference : " Prior to these proceedings in bankruptcy the debtor, by his voluntary application as an insolvent, had caused all his property to be sequestered for the payment of his debts *pro rata*, and these creditors, by virtue of those proceedings, had acquired a right to claim their proportional dividend to be paid from the assets of the debtor in the hands of his assignees on filing and proving their debts according to the provisions of the statute." The same case holds that claims may be proved at any meeting of creditors, which is also permissible under the present National Law of Bankruptcy.

In *Ex parte* Ross, 2 Glynn & Jam., 46, the syllabus is " After a commission issued, the statute of limitations does not run against a creditor of the bankrupt." In this case the notes were dated May 21, 1810, payable three and four

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months from date. Commission issued July 10, 1810. Application to prove in December, 1824. Sole ground of defense, six years had elapsed. The Vice-Chancellor said that "after a commission issued, the statute of limitations did not run against a creditor; that the commission was a trust for the benefit of all the creditors, and it was a known principle that the statute did not run against a trust, and it was ordered, that it be referred back to the commissioners to receive the said proof in respect to the said two promissory notes, having regard to the said declaration, and that the petitioners do tender their proof accordingly."

On appeal to the Lord Chancellor, *id.*, page 330, this was sustained, and he said: "Whatever may be the technical objection, the effect of the commission clearly is, to vest the property in the assignees for the benefit of the creditors; they are, therefore, in fact, trustees, and it is an admitted rule, that unless debts are already barred by the statute of limitations when the trust is created, they are not afterwards affected by the lapse of time. * * * I think the decision of the Vice-Chancellor was right."

In *Richardson, etc., v. Thomas and others*, 79 Mass., 381, the debtor had gone into insolvency, but never obtained a discharge. Action brought at law afterwards. Held, that putting the debt in the schedule and payment by the assignee of part, did not revive the debt; and in such case the pendency of proceedings did not suspend the operation of the statute, because he might still have sued, etc. The court say: "Nor do any of the authorities cited have a contrary bearing. They tend to prove that the statute of limitations does not run against the right of the creditor to prove his debt against the estate of the insolvent in competition with his other creditors, provided he had a good cause of action not barred by the six years' limitation at the time of the first publication of the insolvency. (48 Mass., 435.) But it is a very different question whether the same statute is a bar to the creditor suing the debtor in a common law action upon the original cause of action. The reasons for this are obvi-

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ous and are fully stated in the cases cited." 79 Mass., 381 ; 73 Mass., 274, 387, are of same nature.

The case of *Bowie v. Henderson*, 6 Wheat., 514, is one relating to an Act of Congress which provided that where the debtor made a schedule of his assets and liabilities, recorded it in the clerk's office, and devoted the assets to the payment of his liabilities, he would be discharged from *imprisonment*. He was not discharged from his debts. After this was done it was sought to charge the *debtor himself* as a trustee for his creditors in respect to his future property. The court held, that he was not such trustee ; but it will readily be seen that it has no application to the principle of the Bankrupt Law, that the assignee as to property in his *hands* is trustee for the benefit of the creditors, entitled to have it applied to the payment of their debts.

In *Collister v. Hailey*, 79 Mass., 517, Ch. J. Shaw said : " At the time of the first publication the assets of the insolvent were sequestered and placed in the custody of the law, in trust for those who were then creditors who then had provable debts. Of course, the further lapse of time could not defeat the right thus vested to prove for a share equally with other creditors in this trust fund."

The general principles applicable to all bankrupt and insolvent laws are these : The filing of the petition and the including of a debt in the schedules by the debtor, is a new promise. The goods are sequestered. They are in the custody of the law. They are in trust. The statute of limitations which ran against the debt, ceases to run against the trust, and the debt is not barred if the time of limitation had not expired at the commencement of the insolvency or bankruptcy proceedings. This is a matter of course : the right of the creditor is vested in the trust fund. This would be the case even under a more general assignment to a trustee for the benefit of creditors. It is a general principle.

The decisions in Massachusetts do not profess to be based upon any special language or provision of the statute upon which they were rendered. They quote to sustain them the

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English cases, not because of any similarity between the statutes, in language or provisions, but because of the general principles upon which they rest. The English cases themselves are not based upon any special provisions of the English Bankrupt Act, but upon the general principle, that the property of the bankrupt is set apart as a trust to be applied to the payment *pro rata* of the debts due and payable at the time of the bankruptcy.

The assignee is a trustee for the creditors. There is no adverse interest between them. (Bump, 545, 8th ed.) It is not, therefore, proper to say, that a proof of debt is a suit. It is a mere statutory proceeding to ascertain the amount due; the proceeding for the collection of the debt having already been commenced. "The proceeding in bankruptcy, from the filing of the petition to the discharge of the bankrupt, and the final dividend, is a single statutory case or proceeding." (Bump, 325.) The proof of debt is made before the Register, and is uncontested. The assignee is not a party to it at all. There is no necessity of giving him any notice. Proving the claim has nothing of the character of a suit. Suits imply a controversy between parties; they are commenced by some sort of process; there must be adverse parties. But there is no adverse party to a proof of debt. It is, therefore, technically inaccurate to style the proofs of claims in a bankruptcy proceeding as a "group of suits."

I conclude this discussion with a quotation from Angell on Limitations, Section 167, the standard work on this subject:

"The statute does not run against the creditor of the bankrupt, as a commission in bankruptcy constitutes a trust for all the creditors. This was held by the Master of the Rolls; and afterwards, on appeal, the decision was confirmed by the Lord Chancellor, who said that the effect of the commission was to vest the property in the assignee for the benefit of the creditors, and that he was therefore in fact a trustee, and that it was an admitted rule that unless debts are already barred by the statute of limitations when the

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trust is created, they are not afterwards affected by the lapse of time." See also 24 Penn., 482; 14 S. & R., 487; and 4 Mason, 16.

The proof of the claim of Hawes & Co. in this cause must therefore be allowed.

UNITED STATES DISTRICT COURT—E. D. WISCONSIN.

- "The attaching creditor, though not a party to bankruptcy proceedings, may contest adjudication, on the ground that the requisite number and amount of creditors have not joined in the petition.
- "Costs of attachment proceedings pending when petition in bankruptcy is filed, are not to be reckoned among the provable debts of the debtor; nor will such costs be paid from the estate, unless the proceedings are auxiliary to bankruptcy proceedings or otherwise beneficial to the estate.
- "Letters written by the debtor to third parties, admitting the payment of a claim, interposed by attaching creditors in favor of another alleged creditor to defeat adjudication, are admissible in evidence in a contest upon such claim between the attaching and petitioning creditors.
- "A party advancing money to a debtor for the purpose of aiding him in committing an act of bankruptcy, will not be permitted to prove a claim for the money so advanced, as a debt against the bankrupt."

In re HATJE.

Cotzhausen, Sylvester & Scheiber, for petitioning creditors.
Cottrill & Cary, for attaching creditors.

DYER, J.—On the 24th of April, 1875, certain creditors of Albert W. Hatje filed a petition that he might be adjudicated a bankrupt. The principal act of bankruptcy charged, was, that the debtor had departed from the State with intent to defraud his creditors. On the 3d of May, 1875, Smith, Chandler & Co., creditors of said Hatje, who had, by virtue of process issuing from the State court, attached a stock of goods left by the debtor, moved to set aside the petition, alleging that this court had not jurisdiction to entertain bankruptcy proceedings. This motion was supported by an affidavit setting forth that at the time the petition was filed, the debtor was indebted to one H. P. Hatje, in the sum

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of five hundred and ninety-five dollars, for money borrowed; and it appearing, that neither H. P. Hatje nor Smith, Chandler & Co. had joined in the petition for adjudication, it was contended that the aggregate amount of the debts held by the petitioning creditors, did not equal one third of the provable debts of the debtor. Objection was made by the petitioning creditors, to the right of the attaching creditors, to make the motion or to resist adjudication on the ground mentioned, neither Albert W. Hatje nor H. P. Hatje appearing. Notwithstanding some conflict in the authorities on the question, I held that the attaching creditors stood in such relation to the property of the debtor, and had such an interest in the pending proceedings, that they had a right to appear and contest adjudication upon the jurisdictional point named. This ruling I regarded as sustained by *In re Boston, Hartford and Erie R. R. Co.*, 6 N. B. R., 209; *In re Derby*, 8 N. B. R., 106, and *Clinton et al. v. Mayo*, 12 N. B. R., 39. The question has since been similarly decided by Judge Brown, *In re Bergeron*, 12 N. B. R., 385.

Having determined that the attaching creditors had a right to be heard upon the issue presented, an order was made, directing the debtor to file a list of his creditors; but no list being filed, the case was referred to the Register, to take proofs on the question as to whether the debts represented by the petitioning creditors, amounted to one third of the provable debts of the debtor. At the hearing before the Register, the attaching creditors made proof of their own claim, amounting to six hundred and seventy-eight dollars and thirty-two cents, and interposed the claim in favor of H. P. Hatje, and also the costs of the attachment proceedings commenced by them in the State court, as provable demands against the debtor. Treating the demands in favor of the attaching creditors and of H. P. Hatje as subsisting provable debts, it resulted that the requisite amount of debts were not represented by the petitioning creditors. But the Register rejected the claim in favor of H. P. Hatje as paid and no longer subsisting; and including the costs of the

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attachment proceedings as provable, found and reported that the aggregate debts held by the petitioning creditors, constituted one third of all the provable debts of the debtor. To this report the attaching creditors filed exceptions.

First. The position taken preliminarily by counsel for petitioning creditors, that there was collusion between the debtor and the attaching creditors, and that the former procured his property to be taken on legal process with intent to give the latter a preference, is not sustained by the evidence. The proofs are, that within a day or two after the debtor absconded, he wrote a letter to a personal friend who was salesman for Smith, Chandler & Co., informing him of his departure, and requesting him to take the goods and do the best he could with them. Knowledge that Hatje had absconded, being communicated to Smith, Chandler & Co., probably by the salesman, they began legal proceedings by attachment. There is no evidence of collusion or even concerted action between the parties. The attaching creditors, as they had a right to do, merely endeavored, by usual legal proceedings, to reach the property of an absconding debtor.

Second. The Register, I think, erred in allowing the costs of the attachment proceedings as a demand against the debtor, in estimating the amount of his provable debts. The costs incurred by the attaching creditors, in their legal proceedings, which were not then concluded, did not, in my judgment, constitute a debt within the meaning of the Bankrupt Law, which should be considered in ascertaining the amount of debts owing by the debtor when the petition was filed. In the language of some of the cases, they are not a debt of the bankrupt, for they were not incurred for his benefit or at his request. *In re Fortune*, 2 N. B. R., 662; *In re Preston*, 6 N. B. R., 545. I have held, and I think it is the only safe and correct rule, that even upon applications for the payment of such costs from the estate of the bankrupt, payment will not be ordered unless it be shown that the attachment proceedings were auxiliary to contemplated bankruptcy proceedings, or otherwise beneficial to the estate.

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This is the rule adopted and enforced by Judge Longyear, *In re Ward*, 9 N. B. R., 349. See also *Gardner v. Cook*, Assignee, 7 N. B. R., 346.

Third. The validity of the demand in favor of the attaching creditors is not disputed. The contest here is upon the alleged claim in favor of H. P. Hatje, who is the father of the debtor. It is a claim not personally asserted by H. P. Hatje, nor resisted by A. W. Hatje, for neither of these parties appear. It is presented by the attaching creditors and contested by the petitioning creditors. The proof satisfactorily shows that originally there was a genuine indebtedness for six hundred dollars, owing by the debtor to his father. A small payment was made upon it, leaving due five hundred and ninety-five dollars. The question is, was a preferential payment of the balance of this debt made, at or about the time the debtor absconded? To show such payment, the petitioning creditors rely upon certain letters written by the debtor at Chicago and San Francisco, since he absconded, to third parties in Milwaukee. These letters contain important disclosures concerning the object and circumstances of the writer's departure, and reveal strong indications that one of the purposes of his flight was to save money for his father. But it is earnestly contended that these letters are not admissible in evidence, and when the point was first made I doubted their admissibility. The fact, however, must not be ignored, that the letters are the declarations or admissions of a party to the record, the debtor proceeded against. The admissions relate to a claim against himself in favor of one supposed creditor, but interposed by other creditors, and resisted by the petitioning creditors. All are parties to a proceeding which is something more than a mere suit between the creditors petitioning, and the debtor. "It rather partakes of the nature of a proceeding *in rem*," and all creditors are parties in interest. *In re Boston, Hartford and Erie R. R. Co.*, 6 N. B. R., 209. It is a well-settled principle, that the declarations of a party to the record, or of one identified in interest with him, are, as against such par-

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ty admissible in evidence. Now, in this case, the attaching creditors are interposing a supposed claim held by another alleged creditor against the debtor to defeat adjudication. Here is, to some extent, at least, identity of interest, and although the attaching creditors, by reason of their interest, are permitted to appear, and to the extent of their individual interest do independently appear and contest this proceeding, they, nevertheless, so far as the creditors interested in having an adjudication are concerned, represent the debtor, and speak as well for him as for themselves in setting up this claim. It is right, therefore, that they should abide by the admissions of the debtor, and in this state of the case, I do not discover that it is a violation of rules of evidence to permit them to stand as testimony on the point involved.

If H. P. Hatje were prosecuting the claim, and the debtor were seeking to defeat it, his admissions of its validity would be competent evidence to support it. His admissions of its payment are, I think, likewise admissible in this controversy, where creditors struggling to maintain a preference by attachment, are endeavoring to defeat adjudication of their debtor as a bankrupt, by asserting this claim to be a subsisting unpaid demand. These letters show, I think, that at or about the time the debtor left, he paid his father five hundred dollars on the demand in question. In one of them he says, that he had to leave as the only way to save at least the greatest part of the money for his father. Again he says, in order to do this he was obliged to let other creditors lose, and speaks of the necessary secrecy of his departure. The letters taken together, show a payment of five hundred dollars, that he borrowed fifty dollars from his father for the journey, and that he still owes him one hundred and fifty dollars, the fifty dollars being part of that amount. This state of facts presents the question whether there is any part of this one hundred and fifty dollars which ought not to be counted in estimating the amount of the debtor's provable debts. Apart from the question whether the balance of the debt of five hundred and ninety-five dollars yet unpaid is

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provable (the creditor having received a partial payment under the circumstances named), I can have no doubt that the debt of fifty dollars, created in aid of the debtor's flight, is not provable. To depart from the State with intent to defraud creditors, is an act of bankruptcy. To furnish a party with money for the purpose of aiding him in committing the act, is to participate in the fraud. To permit a party thus to assist another in the commission of an act of bankruptcy, and then to assert his claim for money thus furnished as a provable debt, and thereby defeat bankruptcy proceedings, would simply give legal effect to a fraud, and make the Bankrupt Act destroy itself. In the language of Judge Dillon, *In re Israel*, 12 N. B. R., 204, such a construction would offer a premium to fraud, and leave little of the Bankrupt Act worth saving. Counsel for the attaching creditors urge that it is not proven that H. P. Hatje knew the purposes for which the debtor borrowed this fifty dollars. The testimony shows that the debtor secretly absconded, going first to Chicago, thence to San Francisco; that he left behind him unpaid debts; that he provided for payment of his father's claim to the extent that he was able, and that this was one of the purposes of his departure; that his family accompanied him; that H. P. Hatje, the father, also left Milwaukee; that a few weeks before leaving he stated that his son was to pay him his money or part of it, and that he was going to Germany; and one of the letters written by the debtor distinctly states that his parents went away with him. Unless all inferences from this testimony be dispensed with, the conclusion is unavoidable that H. P. Hatje must have known the purpose for which the fifty dollars was borrowed from him by his son. It is true that fraud is not to be presumed, but fraud may be shown by circumstances. The circumstances here satisfy my mind upon the point. As to the amount of fifty dollars loaned by H. P. Hatje to the debtor, the case "falls within the principle of the maxim *ex turpi causa, non oritur actio*." *In re Stephens*, 6 N. B. R., 533. Whether the remaining one hundred dollars of the

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original indebtedness is provable, the debt being single and entire, and a payment in preference having been made upon it, it is not necessary to decide. Classing it with the claim of the attaching creditors as provable, but rejecting the item of fifty dollars before referred to, the claims of the petitioning creditors amount to more than one-third of all provable debts.

Exceptions to Register's report are overruled and order of adjudication will be entered.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where a judgment creditor has made a levy upon the property of the bankrupt before petition filed, and after commencement of proceedings in bankruptcy procures the sheriff to sell the property upon his execution, the court may set aside the sale, or may confirm it and permit the creditor to retain the proceeds. The latter course is proper where the creditor acted under a misapprehension of his duty, and the property brought its full value.

The assignee should pay from the assets the rent of a store occupied by him, from the filing of the petition to the date of surrendering possession.

Rent and damages for non-performance of covenants in lease, accruing after commencement of proceedings in bankruptcy, are not debts provable against the estate.

In re PETER HUFNAGEL.

UPON the petition of George O. Robinson for an order to realize balance for rent out of the proceeds of certain notes and accounts in his hands, and also for the payment of the rent of certain stores, while the same were in possession of the Bankrupt Court.

The facts are substantially as follows:

First. On the 13th of November, 1874, Hufnagel was indebted to Robinson on a judgment in the Superior Court of Detroit, for rent to November 1, 1874, in the sum of three hundred and twenty-two dollars and eighty-five cents, exclusive of costs; Hufnagel also owed him for rent from November 1st to November 15th, at the rate of eighty dollars per month.

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Second. On the said 13th of November, Hufnagel leased of Robinson, stores Nos. 250 and 252 Woodward Avenue, at seventy dollars per month, for a term commencing November 13th, 1874, and ending May 1st, 1875, these being the same rented from Robinson up to said 13th of November, and occupied by said Hufnagel; that in said lease Hufnagel waived demand for rent or for possession of the premises for non-payment of rent.

Third. On said 13th day of November, Hufnagel, in connection with the making of said lease, turned over to Robinson notes and accounts of the face value of seven hundred and nine dollars and twenty-six cents, to secure the payment of the rent due and to become due; and subsequently said Robinson, in addition, received notes and accounts to the amount of two hundred and eighty dollars, in the same manner and for the same purpose.

Fourth. On the 31st day of December, 1874, the sheriff of Wayne County, by virtue of an execution taken out upon said judgment, levied upon certain goods and chattels in the possession of and belonging to said Hufnagel; the goods so levied upon were not taken out of Hufnagel's store, but remained there, and were receipted for by Thomas W. Martin, an employee of said Hufnagel, who had one of the keys to the store.

Fifth. On the 27th of January, 1875, said Hufnagel filed his petition in bankruptcy.

Sixth. On the 2d of February, the said goods levied upon as aforesaid, still remaining in the store of said Hufnagel, were sold under said execution, by said sheriff, for the sum of three hundred and ninety-six dollars.

Seventh. Said Hufnagel retained the keys to and remained in possession of said stores until March 1st, 1875, and on said date the assignee took the keys and possession; the assignee remained in possession until March 22, when he delivered the keys to Robinson.

Eighth. Robinson knew of the filing of the petition by Hufnagel before the sale by the sheriff.

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Ninth. On the 5th of March, the assignee demanded of Robinson the said accounts and notes, and goods levied upon, or the proceeds thereof; said demand has not been complied with.

Mr. George O. Robinson, in person.

Mr. F. G. Russell, assignee, in person.

BROWN, J.—It is claimed by the assignee, that the petitioner had no right, after proceedings in bankruptcy had been instituted, to sell the bankrupt's property upon his execution against him. No question is made with regard to the validity of the judgment which was obtained on the 12th of November. Execution was thereupon issued and levied on the 31st day of December, twenty-seven days before the proceedings in bankruptcy were commenced, and receipt taken by the sheriff from a third party for the property seized.

First. It is well settled that an adjudication of bankruptcy sweeps within the purview of the Bankrupt Court all the property of the debtor, whether incumbered or unincumbered, and that no steps can thereafter be taken to enforce claims against such property, either by way of attachment, execution, distress, replevin, or foreclosure, except through the Bankrupt Court, or by its permission, in the State court. *Phelps v. Sellick*, 8 N. B. R., 390, and cases cited, p. 394; *In re Cook & Gleason*, 3 Biss., 116; *In re Vogel*, 2 N. B. R., 427; *Stuart v. Hines*, 6 N. B. R., 416.

A party who has levied an execution upon the property of the bankrupt before adjudication, ought not to proceed to a sale without such permission, and if he does so, the sale may be set aside, and he may be held liable for the actual value of the property, regardless of the amount realized upon such sale. *Davis v. Anderson*, 6 N. B. R., 145; *In re Rosenberg*, 3 N. B. R., 130; *Smith v. Kehr*, 7 N. B. R., 97.

Bills have frequently been sustained, enjoining sheriffs of State courts from selling the property of bankrupts upon execution, where it was made to appear that the estate would be injuriously affected. *In re Kerosene Oil Co.*, 3 N.

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B. R., 125; *In re Mallory*, 6 N. B. R., 22; *Jones v. Leach*, 1 N. B. R., 595; *In re Snedaker*, 3 N. B. R., 629; *In re Lady Bryan Mining Co.*, 6 N. B. R., 252; *Samson v. Clark*, 6 N. B. R., 403; *Pennington v. Sale*, 1 N. B. R., 572.

Regularly, therefore, the petitioner should have proved his judgment as a secured debt, and obtained the permission of this court to sell the property by virtue of his execution. *In re Bridgeman*, 1 N. B. R., 312; *In re Bigelow*, 1 N. B. R., 632; *In re Davis*, 2 N. B. R., 391; *In re Ruehle*, 2 N. B. R., 577; *In re Frizelle*, 5 N. B. R., 122; *Bromley v. Smith*, 5 N. B. R., 152; *Davis v. Anderson*, 6 N. B. R., 145.

As it does not appear, however, in this case, that the judgment was obtained by collusion, nor that the levy was improperly made, nor that the property did not bring its full value upon the sale, I think it within the power of the court to say it will not interfere to disturb it. To refuse to confirm the sale, and order the proceeds paid to the assignee, and at the same time to permit the petitioner to prove his claim as a secured debt, and receive his money from the proceeds, would result in nothing but the accumulation of costs. As the petitioner has acted under an honest misapprehension of his duty in the premises, I am disposed, under the circumstances, to confirm the sale, and to hold this part of the transaction valid. The same view was taken of the discretion of the court in refusing to interfere, *In re Iron Mountain Co.*, 4 N. B. R., 645; *In re Bowie*, 1 N. B. R., 628; *Norton's Assignee v. Boyd*, 3 How., 426; *McLean v. Rockey*, 3 McLean, 235; *In re Lambert*, 2 N. B. R., 426; *Lee v. German Association*, 3 N. B. R., 218; *In re Schnepf*, 1 N. B. R., 190; *In re Bernstein*, 1 N. B. R., 199.

I do not think the fact that petitioner held the notes and accounts as further securities for the judgment, deprived him of the lien of his levy, or that such lien was released by taking the receipt of Martin. *Swope v. Arnold*, 5 N. B. R., 148; *Barker v. Binniger*, 14 N. Y., 271; *Bond v. Willett*, 40 N. Y., 377.

After payment of judgment and costs, however, there

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appears to be a surplus of thirty-two dollars, for which petitioner must account to the assignee.

Second. I think the petitioner is entitled to an order for the payment of one hundred and ninety dollars rent, from the commencement of proceedings in bankruptcy to the day possession was surrendered by the assignee. The securities held by petitioner have nothing to do with this claim. They were placed in his hands to secure the payment of rent from Hufnagel, not from his assignee. As the title of the assignee relates back to the commencement of proceedings in bankruptcy, the assignee must pay rent from that date. *In re Walton*, 1 N. B. R., 557; *In re Appold*, 1 N. B. R., 621; *In re Merrifield*, 3 N. B. R., 98; *In re Walker v. Barton*, 3 N. B. R., 265; *In re Laurie et al.*, 4 N. B. R., 32; *In re Butler*, 6 N. B. R., 501.

Third. For the rent due upon the new lease, from its date to January 27th, the date of commencement of proceedings, the petitioner must prove his claim before the Register as a secured debt. On surrendering his securities to the assignee, he may then file a petition for payment from the proceeds.

He has no claim, however, for rent from the surrender of possession by the assignee to the date of re-renting. Section 5071 provides that "where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." "No debts other than those above specified shall be proved or allowed against the estate." I think the design of this provision was to apportion the rent at the date of filing the petition, permitting the rent, then accrued, to be proved as a debt against the estate, leaving the subsequent rent unaffected by the discharge in bankruptcy. Indeed, no other construction is practicable. In the cases of long leases, the settlement of the estate might be indefinitely prolonged, if the landlord were permitted, every time he suffered damage by

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the non-performance of his lease, to prove it as a claim against the estate. Such a claim is, in its nature, almost impossible of liquidation at the date of filing the petition, as the landlord may procure a tenant the next day, and may not be able to find one before the expiration of the lease. There are certain cases of contingent debts and liabilities provided for by Section 5068, but I think claims for rent are controlled by Section 5071. The reasoning of the learned judge for the Southern District of New York upon this point, *In re May & Merwin*, 9 N. B. R., 419, is entirely satisfactory to me, and is supported by the cases of *Webb & Co.*, 6 N. B. R., 302; *In re Merrifield*, 3 N. B. R., 98; *Ex parte Houghton, Lowell*, 554; *Auriol v. Mills*, 4 T. R., 94; *Hendricks v. Judah*, 2 Caines' R., 25; *Lansing v. Prendergast*, 9 Johns., 127; *Savory v. Stocking*, 4 Cush., 607; *Bosler v. Kuhn*, 8 W. & S., 183. This portion of petitioner's claim is therefore disallowed.

An order will be entered in conformity with this opinion.



COURT OF APPEALS—NEW YORK.

A railroad corporation is not liable for an injury caused by the negligence of a special receiver or assignee while operating the road.

Parties who purchase the property and franchise of a corporation from the assignee, do not thereby become its corporators and acquire the corporate entity.

A purchaser is not liable for an injury caused by the negligence of the assignee after the sale and before the confirmation thereof.

ANNA E. METZ, Administratrix, etc., Appellant, v. THE BUFFALO, CORRY & PITTSBURGH RAILROAD COMPANY, Respondent.

APPEAL from order of the General Term of the Supreme Court in the Fourth Judicial Department, reversing a judgment in favor of plaintiff entered on a verdict, and granting a new trial.

This was an action to recover damages for the negligent

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killing of the plaintiff's intestate, Charles F. Metz, while he was a passenger on the Buffalo, Corry & Pittsburgh railroad, built and formerly operated by defendant, at or near Prospect station, on the 24th day of December, 1872.

The defendant admitted that the death of deceased occurred in consequence of the gross negligence of those operating the road.

The defendant proved that, in bankruptcy proceedings commenced against it against its will, it was adjudicated a bankrupt July 19th, 1872, and Ashbel H. Barney was then appointed special receiver of its property and franchises, with power and direction to run the road; that Barney qualified as receiver and took possession of and run the road; that, on October 22d, 1872, Barney was appointed assignee and continued to run the road till December 7th, 1872; that an order of sale of the defendant's road and all defendant's property and franchises was made November 19th, 1872, and they were all sold December 7th, 1872, at Mayville, to holders of the first mortgage bonds given by the defendant, secured by mortgages on all defendant's stock, property, and franchises; that said sale was duly confirmed January 22d, 1873, and a deed executed and delivered in accordance therewith. H. H. Potter was superintendent before the bankruptcy and was reappointed by Barney, and acted as such till January 1st, 1873. After the accident William Phillips, of Pittsburgh, took possession of defendant's road and is now operating it and claims to be the owner of it. Neither the president nor the board of directors of the defendant, nor any person under their orders, had any control of the operation or management of the road after July 19th, 1872.

Benj. H. Austin, Jr., for the appellant. Defendant exists as a corporation and can be sued as such. (Laws 1864, Chap. 422, p. 1006; *Stone v. W. Tr. Co.*, 38 N. Y., 240-242; *Mickles v. Roch. City Bk.*, 11 Paige, 118; *People v. Prest. Man. Co.*, 9 Wend., 351-382; *Towar v. Hale*, 46 Barb., 361; *Gilman v. G. P. Sugar Co.*, 4 Lans., 482, 484; *People v. A. and Vt. R. R. Co.*, 24 N. Y., 261; *Willitts v. Waite*, 25 Id. 577-582;

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Laws 1832, Chap. 295; 3 Edm. Stat. at Large, 674; *N. Y. M. Iron Wks. v. Smith*, 4 Duer, 362-379; *Talmadge v. Pell*, 9 Paige, 410-414.) A corporation cannot delegate functions given it by the Legislature without express legislative sanction. (*Beman v. Rufford*, 6 E. L. and Eq., 106-110; *Winch v. B. etc., R. R. Co.*, 13 *Id.*, 506-517; *S. Y. R. and R. D. Co. v. G. N. R. Co.*, 19; *Id.*, 513-518; *T. and R. R. R. Co. v. Kerr*, 17 Barb., 581, 601; *Adams v. B. H., and E. R. R. Co.*, 5 N. B. R., 234; 2 R. S., 463; Laws 1850, Chap. 140, Section 28, sub. 10; Laws 1857, Chap. 444, Section 1; *Seymour v. C. and N. F. R. R. Co.*, 25 Barb., 308.) The statute in bankruptcy supersedes all State statutes inconsistent with it as to the manner of disposal and sale of the bankrupt's property. (*Sinnot v. Davenport*, 22 How., 227; *Prigg v. Comm. of Penn.*, 16 Pet., 539; *Houston v. Moore*, 5 Wheat., 1, 21, 22; *In re Kirk*, 1 Park. Cr., 67; *Gibbons v. Ogden*, 9 Wheat., 1; *Passenger cases*, 7 How., 394-399; *Cooley v. Wardens Phil.*, 2 *Id.*, 299.) When the assignee qualified he became the owner of all the franchises and property of the defendant. (Bankr. Act, Section 14; *McLaren v. Hart. F. Ins. Co.*, 5 N. Y., 151; *Adams v. B., H. and E. R. R. Co.*, 4 N. B. R., 314.) It was not the absolute duty of the assignee to run the road. (*Jackson v. De Forest*, 14 How. Pr., 81-83; *Smith v. N. Y. C. S. Co.*, 28 *Id.*, 377; *Dayton v. Wilkes*, 17 *Id.*, 510-512; *Crane v. Ford*, Hopk., 114; *Marten v. Van Schaick*, 4 Paige, 479, 480.) Bankruptcy did not dissolve the corporation. (1 R. S., [marg. page] 600, Section 1, subs. 1, 2.) Until dissolved by judgment of the court, defendant remains intact as a corporation, and in case of injury to any one, by the exercise of its franchises as such, it is the party to be sued. (*King v. Emory*, 2 T. R., 515-536; *King v. Passmore*, 3 *Id.*, 199, 244; *Sus. Canal Co. v. Bonhan*, 9 W. & S., 27; *W. and T. Plank-road v. Griffin*, 57 Penn., 417.)

Franklin D. Locke, for the respondent.

GROVER, J.—The question in this case is whether the defendant was liable for the injury sought to be redressed in

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the action. It was not so unless the positions of the plaintiff's counsel can be sustained. These are that Barney, while operating the road, after his appointment as special receiver by the court, in the bankruptcy proceedings against the defendant, and while operating the same as assignee in bankruptcy, was acting as the agent and servant of the defendant. If he was so acting, it follows that the defendant was responsible to passengers for injuries received through his negligence and the negligence of those employed by him in operating the road.

The counsel further insists that, as the injury was received by the intestate after the sale of the road, fixtures, etc., by the assignee in bankruptcy, that the purchasers at such sale acquired, in addition to the property purchased, all the franchises before possessed by the defendant, and also the legal entity of the corporation, so that this entity was by the sale and purchase transferred to the purchasers, who thereby became the corporators constituting the corporation; such purchasers taking the place of the former stockholders therein. Should this last position be sustained, I do not see how it would aid the plaintiffs. Although the sale took place prior to the happening of the injury, it was made subject to confirmation by the court; and this was not obtained and the property was not conveyed to the purchasers until some time thereafter.

It is insisted by the counsel that the deed, when given, related back to the time of the purchase. Conceding this to be so, it does not follow that they were responsible for the negligence of those operating the road. Before the confirmation of the sale and conveyance of the property, the purchasers had no right to intermeddle with the road or any of the property purchased; and there was no evidence that they in fact did so. Those operating the road were not employed by them, were not subject in any respect to their control, were not their employees or servants, and, consequently, they were not responsible for their negligence. But I think that the purchasers did not, by the purchase, take

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the place of the pre-existing stockholders of the defendant, and thereby become its corporators, acquiring the corporate entity. True, they acquire the railroad tracks, fixtures, rolling stock, etc., together with the right or franchise of using it for the same purposes that the defendant was authorized to use it, subject to the same duties to the public as the defendant had been.

The counsel cites *The Commonwealth v. Central Passenger Railway* (52 Penn., 506), as showing that the purchasers acquired and became the corporators by the purchase. An examination of this case shows that it was decided wholly upon a statute of that State, passed in 1861, and another in 1863. *Wellsborough, etc., Plank-road v. Griffin* (57 Penn., 417) was a case where the purchase was made before the passage of the Act of 1861, and the court held that the purchasers did not become a corporation.

The counsel cites Chapter 444 of the Laws of 1857, and subsequent acts amending the same, as sustaining his position. By these, power is conferred upon railroad corporations to borrow money, and mortgage their road, franchises, etc., to secure its repayment; and provision is made for the sale of the property, franchises, etc., in case of default in payment, and for enabling the purchasers, and others that they may associate with them, to organize a new corporation; but there is nothing in any of the provisions showing that the purchasers became stockholders in the existing corporation, or that that was transferred to and became vested in them. Indeed, were this so, the property purchased would be liable to all the existing debts of the corporation; and thus the mortgage security and the rights of the purchaser might be entirely defeated. I think it clear that the corporation did not vest in the purchasers, and that they did not become stockholders or corporators in the pre-existing corporation.

In reference to the position that the receiver and assignee was the agent and servant of the defendant, which was therefore liable for his acts, it must be borne in mind that the defendant was not a voluntary bankrupt. The appoint-

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ment of Barney as receiver was by the court, against its will. It had nothing to do with his appointment, or any control over his employees. Upon what principle can the defendant be held responsible for their negligence? A master or employer is held liable for the negligence of those in his service for the reason that it is his duty to enforce the observance of care by them. He is held liable to those injured by the failure by him to perform this duty. But this has no application to the present case. Here the defendant, by the act of the law, has been deprived of the possession of the road and of all control over those engaged in operating it; and by like act, the possession and control has been given to others. The defendant had not, thereafter, anything to do with operating the road. True, if profits were earned thereby, they would inure to the benefit of the defendant by becoming assets for the payment of debts. But this did not make it liable for the conduct of those in no sense its employees or servants. The employees must look to those who employed them for compensation; and those who contracted with the receiver or assignee must also look to him. He was liable for the breach of contracts made by him, and for injuries sustained by his negligence or that of his employees in their performance. (*Rogers v. Wheeler*, 43 N. Y., 598.)

Whether the court would have permitted its officer to be prosecuted at law for the injury, or would itself have afforded the proper redress and protected him, by injunction, against suits in other courts, is a question not involved in the case.

Whether the surrogate of Erie county had jurisdiction to grant letters of administration of the goods, etc., of the intestate, depends upon the question whether, at the time of his death, he was an inhabitant of that county or of the State of Pennsylvania. If the former, the surrogate of that county had such jurisdiction. If the latter, he had not. (2 Statutes at Large, 75, Sections 23, 24.) Upon this point the evidence was not entirely clear; and I am not prepared to say that the trial judge erred in his ruling in respect to it; although the judgment was reversed and a new trial ordered by the

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General Term, yet no opinion was given. The trial court would have had no knowledge of the views of that court, as to the law governing the case, and might have been much embarrassed in consequence.

The order appealed from must be affirmed, and judgment absolute given against the plaintiff upon the stipulation.

All concur.

Order affirmed, and judgment accordingly.

COURT OF APPEALS—NEW YORK.

Where the bankrupt is seeking to prevent the establishment of a claim against him, he has sufficient interest to entitle him to maintain an appeal from a judgment thereon.

If a judgment debtor is declared bankrupt after the taking of an appeal, and the judgment is thereafter affirmed by the General Term, with costs, he has sufficient interest to sustain an appeal from the judgment of affirmance.

Costs incurred after the bankruptcy are not provable against the estate.

MARIA D. SANFORD, Respondent, v. WILLIAM A. SANFORD, Appellant.

THIS was a motion to dismiss an appeal. The grounds of the application and the facts appear in the opinion.

Sawyer & Russell, for motion.

E. C. James, opposed.

RAPALLO, J.—After the recovery of judgment in this case and an appeal to the General Term, the defendant was declared a bankrupt on his own application. The plaintiff, nevertheless, with notice of that fact, proceeded to the argument of the appeal at General Term, and obtained a judgment of affirmance and for the costs of the appeal. From that judgment the defendant appeals to this court. The plaintiff moves to dismiss this appeal, on the ground that it can only be prosecuted by the assignee in bankruptcy, and cites the case of *Herndon v. Howard* (4 N. B. R., 212 ; 9 Wal., 664), as a controlling authority.

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Giving to the decision in that case the largest effect which can legitimately be claimed for it, it amounts only to this: That in an appeal from a judgment against an adjudged bankrupt the assignee in bankruptcy may, if he see fit, intervene and be substituted for the bankrupt. Where the bankrupt is seeking to maintain a right to property, which right, if existing, has passed to the assignee, the latter is the proper party to prosecute the action or appeal. When the bankrupt is seeking to prevent the establishment of a claim against himself, the assignee, in the interest of creditors, may well be allowed to intervene in order to exclude claims which, if established, might be entitled to dividends. But, in the latter case, the bankrupt also certainly has an interest sufficient to entitle him to maintain an appeal. He may never obtain a discharge, and then the erroneous judgment will be a charge upon him. But, in the present case, the bankrupt has a direct and exclusive interest to a certain extent. The judgment of affirmance appealed from contains also a judgment against the bankrupt for the costs of the appeal incurred after the bankruptcy. These costs would not be provable against the bankrupt's estate, and his liability therefor would, consequently, not be affected by the discharge should he obtain one, and as to the recovery for these costs the assignee has no interest. The bankrupt, therefore, having a sufficient interest to sustain an appeal, and the assignee not asking to be substituted, but for aught that appears, being content with the action of the bankrupt in protection of the interests which they both represent, we do not perceive any ground upon which the other party is entitled to ask that the appeal be dismissed.

All concur.

Motion denied.

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SUPREME COURT—NEW YORK.

If a party who is proceeded against by a summary petition, consents to a reference of the case to a Register to take proof, he thereby gives the District Court jurisdiction over his person, and cannot impeach its decree in a collateral action.

PEOPLE ex rel. JENNYS v. BRENNAN.

APPEAL by Matthew T. Brennan, late Sheriff of the County of New York, from an order at Special Term directing his punishment for contempt.

The relator, Marianna Jennys, on or about the 11th day of July, 1871, recovered a judgment in this court against her husband, John L. R. Jennys. On the 28th day of the same month an execution against property was issued upon the judgment to the appellant, as Sheriff of the County of New York, upon which he collected the sum of twelve hundred and seventy-seven dollars and ninety cents, besides his fees and expenses. Before the moneys so collected were paid over proceedings were taken in the United States District Court for the Southern District of New York, under the Bankrupt Law, for the purpose of having the judgment debtor and his partner adjudged bankrupts, and for a distribution of their property among their creditors. While those proceedings were pending, and on the 10th day of May, 1872, an order was made on the application of the relator, and after hearing the appellant, ordering him to pay over to her the moneys collected by him on the execution. From that order he appealed to the General Term, where it was affirmed on the 4th day of June, 1872. A further application was made to punish the appellant for contempt for not paying over the money as required and directed by the order of the 10th of May, 1872, and that resulted, on the 5th of October, 1874, in an order imposing a fine upon him, amounting to the sum of fourteen hundred and eighty-three dollars and five cents, and two hundred and sixty dollars costs and expenses of the pro-

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ceedings, and directing his commitment to prison until he should pay the same. Upon the hearing on which the last order was made it was shown that on the same day the order of the 10th of May, 1872, was served upon the appellant, and near the same time an injunction was also served upon him, issuing out of the United States District Court, enjoining and prohibiting the payment of such moneys to the relator. It was further made to appear that a petition was presented to that court by the assignee, who had been appointed in the bankruptcy proceedings, for a disposition of the conflicting claims made to the moneys in the hands of the appellant under the execution. On the hearing of that petition the relator, the appellant, and the assignee appeared by their respective counsel, and an order by consent was made on the 10th of February, 1872, referring the claim made by the assignee to the money to one of the Registers of the court, to take proof and report it with his opinion to the court. At the outset of the hearing before the Register the relator's counsel objected that the proceeding by petition was improper, and that her right to the money could only be properly contested by a bill in equity. After that both the claiming parties proceeded with the hearing, and gave evidence before the Register. He afterward returned the evidence to the court with his opinion in favor of the assignee, and the United States District Court, after hearing the counsel for the relator and the assignee, and on notice to the appellant, on the 1st day of March, 1873, ordered him to pay the money over to the assignee, which he did on the 10th day of that month.

On the 20th day of June, 1873, an attachment was ordered to issue against the appellant, to bring him before the court for punishment for disobeying the order of the 10th of May, 1872, and in the proceeding following his arrest on the attachment, the order was made imposing a fine upon him for such disobedience. From the last order this appeal was taken.

J. Sterling Smith and *A. J. Vanderpoel*, for appellant.

O. P. Buel, for respondent. The order of May 10 is not

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open to impeachment. *People v. Sturtevant*, 9 N. Y. 263, 266; *Pitt v. Davison*, 37 *Id.*, 235; *People v. Johnson*, 38 *Id.*, 63; *Woodgate v. Fleet*, 44 N. Y., 11, 14; *Davis v. Mayor of New York*, 1 Duer, 451; *Erie Railway Co. v. Ramsey*, 45 N. Y., 637. The Bankruptcy Court was without jurisdiction to decide as to claims to the moneys. *Marshall v. Knox*, 8 N. B. R., 97; 16 Wall., 551; *Smith v. Mason*, 6 N. B. R., 1; 14 *Id.*, 419; Bump on Bankruptcy (7th ed.), 201; *Knowlton v. Prov. & N. Y. S. S. Co.*, 53 N. Y., 77; *People v. White*, 24 Wend., 520; *Buffalo, etc., R. R. Co. v. Supervisors, etc.*, 48 N. Y., 93; *Bloom v. Burdick*, 1 Hill, 130; *Norton v. Cook*, 9 Conn., 314; *Kerr v. Kerr*, 41 N. Y., 272; *Blin v. Campbell*, 14 Johns., 432; *Bigelow v. Stearns*, 19 *Id.*, 39; *Burckle v. Eckhart*, 3 N. Y., 132; *Clapp v. Graves*, 26 *Id.*, 418; *Attorney-General v. Hotham*, 1 Turn. & Ruis., 209.

Present—Davis, P. J., Brady and Daniels, JJ.

DANIELS, J.—The respondent's counsel insists that this court is concluded by the order made on the 10th of May, 1872, directing the appellant, the sheriff, to pay her the money he had previously collected on the execution in her favor, from questioning the propriety of that direction. But that is clearly a misapprehension of the condition of the case. For the order which directed the attachment to be issued so far modified the order making that direction, as to allow the parties to read upon the hearing which should be afterward had, the papers used by the respective parties on the hearing of a preceding order to show cause, and from the circumstance that the proceedings in the United States District Court were produced and proved on the part of the sheriff, it may be inferred that they were within the scope of the modification so made. This conclusion is further warranted by the fact that no objection that they were not within it seems to have been taken by the relator to that course of proceedings, and the opinion of the learned justice by whose direction the order for the attachment was entered, very decidedly confirms that view of the liberty secured by means of it. From that it appears that the intention existed to

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allow the sheriff to show that the relator had consented to the reference made of the controversy concerning the title to the money collected under the execution by the United States District Court, by way of an answer to the proceedings instituted to punish him for disobeying the order directing him to pay the money to her; and on the final hearing of that proceeding, that fact, as well as the hearing and final order following it, were shown for the purpose of protecting him from the order afterward made, imposing a fine upon him for his disobedience of the order directing the payment to the relator. These facts were entirely proper to be shown on the part of the sheriff for another reason; for although the reference in the United States District Court was ordered before the order was made directing him to pay the money to the relator, the hearing itself was chiefly if not entirely afterward, and the final order under which the money was paid to the assignee was not made until the 1st day of March, 1873. The effect of the hearing and of the order made upon its determination could not be considered, and were not involved in the order of the 10th of May, 1872, directing payment to the relator, and unless the sheriff could prove them for his protection in the proceedings instituted by the attachment, he would have been completely deprived of all benefit from them. They were entirely proper for the consideration of the court in the proceedings taken to punish the sheriff for disobeying the order of the 10th of May, 1872, under the provisions contained in the order directing the attachment, as well as from the circumstances that the proceedings in the District Court of the United States were not concluded until long after the order which was disobeyed was made. At that time it could not be known whether the proceeding pending in the District Court would result in a direction adverse to the relator's claim, and it was not possible for the court to consider or adjudge the effect of such a direction.

The first opportunity for presenting and considering the effect of the determination which was made, was in the proceedings taken by the attachment, and in them it was fully

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shown, together with what preceded and followed it in the United States District Court. But notwithstanding the adjudication of that court, that the money in controversy should be paid by the sheriff to the assignee in bankruptcy, and the actual payment following it, the Special Term of this court held in the proceedings instituted by the attachment that the payment was unlawful, and that the sheriff must pay the money again to the relator. The effect of the decision is that the proceedings in the United States District Court, and payment under and pursuant to them, constituted no proper answer to the relator's demand for the same money. Whether that conclusion was correct or not, is the point now remaining to be considered in the disposition of the present appeal.

Under the Bankrupt Law, there can be no doubt but that the proper mode of determining the conflicting claims made for the money collected upon the execution, was by a bill in equity either by the assignee or the sheriff. That point has been definitely settled by the decisions made in *Smith v. Mason*, 6 N. B. R., 1; 14 Wall., 419, and *Marshall v. Knox*, 8 N. B. R., 97; 16 *Id.*, 551. But in both those cases the proceedings by petition were not only opposed by the parties proceeded against, but they were reviewed in the manner which the Bankrupt Law provided for that purpose. The present case is distinguishable from them in both respects. For the relator first consented to the reference of the claims under the petition of the assignee, and after a determination against her, denies its effect in a collateral proceeding. The proofs produced upon the hearing of the proceedings under the attachment, show that her counsel consented to the reference in order to avoid the necessity of the more formal action by bill of complaint, and that consent was in no manner attempted to be withdrawn until it had been acted upon, and the reference ordered. After that, and after the objection was made before the Register, that the proceeding should have been by bill, the relator proceeded with the hearing, and gave, as well as contested, evidence, which was pertinent to the settlement of

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the controversy embodied in the order. The objection was renewed in the brief presented to the United States court on the final hearing, but in the disposition then made of the case, it must have been disregarded.

That the United States District Court had jurisdiction over the controversy existing between the relator and the assignee is settled by the authorities already cited. And if her consent was sufficient to subject her to that jurisdiction by the proceedings commenced by the petition, then the objection afterward made did not have the effect of depriving the court of the authority which she had voluntarily given it over her person.

It had the power of subjecting her to its jurisdiction for the settlement of the dispute existing between her and its officer, but not by means of the summary proceeding taken by him, unless she elected to consent to it. But as she did consent, and the reference to take the proof was made upon that basis; by that act she surrendered herself to the jurisdiction of that court for the purposes comprehended in the petition. She was irregularly brought before it, but waived the irregularity by the assent to the proceedings which her counsel gave in her behalf. That gave it jurisdiction over her person, and as the subject-matter was within its lawful authority, that was sufficient to enable the District Court to proceed with the hearing and decision of the dispute concerning the money in the sheriff's hands. After jurisdiction was obtained in this manner over the relator, the court had the right to retain it until all the purposes of the proceeding were fully attained (*Pilt v. Davidson*, 37 N. Y., 235, 243); and even though it might have been an irregular proceeding, it was still binding and effectual as long as it was not reversed nor set aside.

This was held of a similar proceeding in the case of *People v. Norton*, 9 N. Y., 176, where a trustee had been removed by petition instead of by bill of complaint. By way of answering that objection, it was replied in the opinion delivered, and concurred in by all the members of the court,

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that the Court of Chancery had general jurisdiction of all cases of trust, and the power by its general authority, independent of any statute, to displace a trustee on good cause shown, and to substitute another in his stead. It is said that this must in all cases, according to the course and practice of that court, be done by bill and not upon petition. But a departure from the usual practice of the court, in doing an act which the court has authority to do, does not render the act void. It may be irregular or erroneous, and upon a direct proceeding may be set aside or reversed; but its validity cannot be questioned in a collateral action.

This principle is directly applicable to this case, and the decision is a decisive authority against the position taken in the relator's behalf. And it is further fortified and maintained by the circumstance, that consent has generally been held sufficient to confer jurisdiction over the person of the individual consenting to it. To the same effect, also, is the case of *Fisher v. Hepburn*, 48 N. Y., 41, 52. This was assumed to be the case in both the authorities cited from the United States Supreme Court Reports. For that court held that "strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such litigation, cannot be compelled to come into court under a petition for rule to show cause." *Marshall v. Knox*, 8 N. B. R., 97; 16 Wall., 557. A voluntary appearance was evidently considered to be sufficient for all the purposes of jurisdiction, even over strangers to the proceeding.

The same thing was decided in *Ex parte Squires v. Broome* Common Pleas, 10 Wend., 600, where the defendant was served with a declaration out of the county, which gave the court no jurisdiction over his person. And it was held that he waived the objection by procuring an order in the cause that the plaintiff should file security for costs.

Objection to the jurisdiction over the person of a party may be expressly waived, and the same thing may be done by implication, by means of any act indicating it to be the

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design of the person entitled to make it, not to insist upon it. *Allen v. Malcolm*, 12 Abb. (N. S.), 335; *Hobart v. Frost*, 5 Duer, 672; *Baker v. Beaman*, 6 Hill, 47; *Conklin v. King*, 10 N. Y., 440, 446; *Buel v. Trustees of Lockport*, 3 *Id.*, 197, 200. And in *Clapp v. Graves*, 26 N. Y., 418, the principle was applied to the support of a judgment recovered before a justice, where the defendant, a non-resident, was proceeded against by a long instead of a short summons. As he appeared in the action and took no objection to the process, the jurisdiction over him was held to be complete; and that, too, when the statute provided that it could only be acquired by the service of a short summons. Other cases of a similar nature will be found in Vol. II., Wait's Law and Practice, 17, 19.

Neither the case of the *Buffalo & State Line R. R. Co. v. Supervisors of Erie*, 48 N. Y., 93, nor that of *Bloom v. Burdick*, 1 Hill, 130, is opposed to this principle. In the latter, the real property of infants had been sold upon proceedings in a surrogate's court, without the appointment of a guardian for them. Being infants, they could not waive the defect, and for that reason the court had no jurisdiction over them. According to the authorities applicable to the present controversy, the relator was concluded by the proceedings, instituted with her consent, in the United States District Court, for the determination of the dispute concerning the title to the money in the sheriff's hands. *Dwight v. St. John*, 25 N. Y., 203; *Embury v. Conner*, 3 *Id.*, 511, 522. The determination there made fully justified him in paying it over to the assignee; and that was sufficient, under the circumstances properly appearing in the full hearing, allowed by the order directing the attachment, to exonerate him from the ordinary consequences which would otherwise have resulted from his disobedience of the order of the 10th of May, 1872. By the proceedings taken with the relator's consent, she precluded herself from the right to complain of such disobedience.

The order appealed from should be reversed, with ten

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dollars costs, besides disbursements, and the motion made denied, with ten dollars costs.

Ordered accordingly.

SUPREME COURT—NEW YORK.

If the proceedings in bankruptcy are discontinued without the appointment of an assignee, a party who took an assignment of a *chose in action* from the bankrupt, after the commencement of such proceedings, may maintain an action thereon.

KLINE v. BAUENDAHL.

APPEAL by defendants from a judgment in favor of plaintiffs entered upon the report of a referee.

The action was brought by Adam W. Kline and others against Walter Bauendahl and others. Sufficient facts for an understanding of the point passed upon appear in the opinion.

Present—Learned, P. J., Boardman and James, JJ.

LEARNED, P. J.—After the plaintiff's assignor, one Lee, had been declared a bankrupt, he assigned to the plaintiff the claim in controversy. No assignee in bankruptcy was, however, appointed; and before the trial of this action the bankruptcy proceeding was discontinued.

The defendants insist that the assignment of this claim to the plaintiff was, for these reasons, invalid. But although he had been adjudged a bankrupt, he was not thereby divested of his property. The title to it was still in him, and would not pass from him, at the soonest, until the appointment of an assignee in bankruptcy. Whatever retroactive effect the appointment of the assignee in bankruptcy might have is immaterial, as no assignee was appointed. So, too, if the assignment of this claim is contrary to the policy of the Bankrupt Law, that is a position to be taken by creditors, or by the assignee in bankruptcy for them. It cannot be taken by these defendants.

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Upon the merits of the case there is no reason to disturb the findings of the referee. The questions were almost exclusively questions of fact, and they are correctly found. There is nothing in the remittance of the check, and the receipt of it by Mr. Lee, sufficient to ratify sales which were made contrary to an express contract. As to the conversation between Lee and the defendants on the 16th of November, there is some conflict in the evidence; but the referee has taken the version given by Lee, and we think he was right in so doing.

The judgment should be affirmed.

Judgment affirmed.

INDEX.

ADJUDICATION.

1. An adjudication is in the nature of a decree *in rem* as respects the *status* of the debtor, and where the court has jurisdiction, is only assailable by a direct proceeding in a competent court, if due notice was given, and the adjudication is correct in form.—*Michaels et al. v. Post, Assignee*, 152.
2. Where the record shows jurisdiction, an adjudication is conclusive, and cannot be assailed in a collateral action.—*Michaels v. Post, Assignee*, 152; *Sloan v. Lewis*, 178.
3. A creditor cannot impeach an adjudication in a collateral action, on the ground that it was procured by fraud.—*Michaels et al. v. Post, Assignee*, 152.

ACTION.

1. If the proceedings in bankruptcy are discontinued without the appointment of an assignee, a party who took an assignment of a *chose in action* from the bankrupt, after the commencement of such proceedings, may maintain an action thereon.—*Kline v. Bauendahl*, 575.
2. A party who purchases a *chose in action* from the assignee cannot maintain an action thereon in his own name in a State court, where the laws of the State do not permit an assignee of a *chose in action* to sue in his own name.—*Leach v. Greene*, 877.
3. C. brought a suit against the Express Company to recover damages for loss of goods. The defendant pleaded in abatement, that since the commencement of the action, C., as a member of the firm of M. C. & Co., had filed his petition in bankruptcy, that this suit was embraced in his schedule of assets, and that a trustee had been duly appointed. The defendant requested the court to charge the jury, that "If they find for the plaintiff, to render their verdict for the use of Gabriel Zeigler, the trustee, if the evidence shows that he was appointed trustee, and this claim was among the assets transferred to him, and it does not appear that a transfer to the plaintiff has been made with the consent of the committee appointed under the proceedings in bankruptcy."

The jury found for the plaintiff.

Held, that the verdict as it stands cannot endanger the rights of the Express

Company, for if the trustee be the only person to whom the money can be legally paid, then a payment to him would be a discharge of the debt.

That the Express Company or the trustee can have whatever rights either may have, fully protected by taking the proper steps for that purpose.

—*Southern Express Co. v. Connor*, 53.

4. An action for the malicious abuse of the garnishee process is an action for a personal injury, and does not pass to the assignee.—*Noonan v. Orton*, 405.

5. A right of action for a mere personal injury does not pass to the assignee.—*Ibid.*

6. If the assignee does not intervene, a pending action may be prosecuted in the name of the bankrupt.—*Ibid.*

See ASSIGNEE, 6.

ACTS OF BANKRUPTCY.

1. An assignment is an act of bankruptcy, although it is so defective that it is void under the State laws.—*In re S. Mendelsohn*, 533.

2. A fraudulent chattel mortgage on the bankrupt's stock of goods, to secure an alleged debt of several thousand dollars, made with intent to hinder, delay, and defraud creditors, is a sufficient act of bankruptcy to warrant an adjudication.—*In re James A. McKibben*, 97.

3. Under the amendment of 1874 the general allegation that the debtor "being a merchant and trader, fraudulently stopped payment" is sufficient, without alleging that the stoppage was of commercial paper. The clause was intended to cover the fraudulent stoppage of the payment of debts generally.—*In re Joseph E. Hadley*, 366.

APPEAL.

1. No appeal lies to the Supreme Court from a decision of the Circuit Court upon a petition to have an adjudication set aside.—*Sandusky v. First National Bank*, 176.

2. A decision upon a petition to have an adjudication set aside can only be reversed under the supervisory jurisdiction of the Circuit Court.—*Sandusky v. First National Bank*, 176.

3. The decision by a State court that the bankrupt had no title, does not present a question of which this court can take jurisdiction in a writ of error to a State court.—*Scott & Nasse v. Kelly, Sheriff*, 96.

4. An appeal from the District Court to the Circuit will be dismissed unless notice is given to the opposite party within ten days after the entry of the decree or decision appealed from.—*Wood v. Bailey, Assignee*, 132.

5. The words "defeated party" in Section 4981 must be construed "opposite party," or "successful party," or "adverse party."—*Wood v. Bailey, Assignee*, 132.

6. A refusal to set aside execution on account of defendant's discharge in bankruptcy, is not subject to a writ of error. The remedy in case of such refusal is by writ of *audita querela*, upon which the judgment of the court below is examinable.—*Williams v. Butcher*, 143.

7. Where the bankrupt is seeking to prevent the establishment of a claim against him, he has sufficient interest to entitle him to maintain an appeal from a judgment thereon.—*Sanford v. Sanford*, 565.
8. If a judgment debtor is declared bankrupt after the taking of an appeal, and the judgment is thereafter affirmed by the General Term, with costs, he has sufficient interest to sustain an appeal from the judgment of affirmance.—*Sanford v. Sanford*, 565.

ARREST.—See PROVISIONAL WARRANT, 1, 2, 3, 4, 5.

ASSENT.—See DISCHARGE, 3, 5, 6.

ASSIGNEE.

1. The assignee represents creditors, and may impeach a deed which is void as against them for want of due registration.—*Barker v. Smith et al.*, 474; *Contra In re Charles Collins*, 379.
2. If the debtor, though insolvent, acquiesces in a sale of stocks by a secured creditor, his assignee is bound by such acquiescence, although the stocks are sacrificed.—*Sparhawk et al. v. Drexel et al.* 450.
3. The assignee is not bound by the bankrupt's ratification or acquiescence in a sale of collaterals made after the commencement of the proceedings in bankruptcy.—*Sparhawk et al. v. Drexel*, 450.
4. Where L. & G., of Portland, Oregon, sold wheat to M. & H., of San Francisco, to be delivered on shipboard at Portland, at one dollar and eighty-five cents per cental, and then made a contract with C. & Co., wheat buyers, to purchase said wheat on joint account, each party to furnish one half of the money necessary to make the purchase, and to receive one half of the profits, if any :—*Held*, that the joint venture and interest of C. & Co. in the wheat, ended with the delivery of the same on shipboard, and that thereafter the wheat belonged to M. & H., subject to the power of L. & H., as sellers of the same, to exercise the right of *stoppage in transitu*, and that when, upon the failure of M. & H., said L. & H. exercised said right and took said wheat into their own possession, it was for their own benefit as sellers of the same, and not that of C. & Co., who were not the sellers of the wheat to M. & H., and had no power over it or interest in it.—*In re Comstock & Co.*, 110.
5. The assignee is not entitled to twenty days' notice before the bringing of an action to recover property taken by him from the possession of the owner.—*Leighton v. Harwood*, 360.
6. If a conventional trustee, claiming title under an assignment, files a bill to recover assets belonging to the estate, the assignee may intervene by a supplemental bill.—*The Collateral Security Bank v. Fowler, Trustee*, 289.

See ACTION, 4, 5.

ASSIGNMENT.

1. The assignment is not a precept issued by the court, but a conveyance of the bankrupt's property, giving the assignee the mere right of ownership, but no authority, or color of authority, to take the property of strangers.—*Leighton v. Harwood*, 360.

2. An assignment, though voidable at the suit of the assignee, is not void.—*Sparhawk et al. v. Drexel*, 450.
3. An assignment for the benefit of creditors is not fraudulent, because it states the assignee's desire to distribute his estate "without the sacrifice of property incidental to judicial and official sales, and without the expenses attendant upon winding up an estate in bankruptcy."—*In re Charles J. Marter*, 185.
4. An assignment by a debtor of all his property for the benefit of all his creditors, under the provisions of the laws of Iowa, is an act of bankruptcy, and though not absolutely void *ab initio*, is subject to be avoided by proceedings taken under the Bankrupt Act.—*Cragin, Assignee, v. Thompson*, 81.
5. Where the assignee, appointed under such assignment, took charge of the debtor's property and sold it, and in all respects acted in perfect good faith, he is not to be held personally liable to the assignee in bankruptcy of the same debtor, for the value of the property assigned to him, or its proceeds.—*Ibid.*

See ACTS OF BANKRUPTCY, 1 ; EVIDENCE, 8 ; RENT, 2.

ATTACHMENT.

1. Where the defendant, after receiving his discharge in bankruptcy, filed a bond to dissolve an attachment existing upon the property of the defendant for a period of more than four months prior to the commencement of bankruptcy proceedings:
Held, that the bond was filed too late, and that the plaintiff is entitled to have the special judgment entered.—*Johnson v. Collins*, 70.
2. If the creditor realizes his money under a judgment entered in an attachment suit without collusion, he may retain it, although the attachment was issued within four months before the commencement of the proceedings in bankruptcy.—*Henkelman, Jackson & Phelps v. Smith, Assignee*, 121.
3. A bankrupt defendant may file a bond to dissolve an attachment, although it was issued more than four months before the commencement of the proceedings in bankruptcy, and have the case continued to await his discharge.—*Braley v. Boomer*, 303.

See DEBTS, 13.

ATTORNEY.—See DISTRIBUTION, 4.

CIRCUIT COURT.—See APPEAL, 2, 3.

BOOKS.—See DISCHARGE, 1, 2,

COMPOSITION.

1. General Order No. 36 is entirely prospective, and does not apply to proceedings pending at the time of its adoption.—*In re Holmes & Lissberger*, 86.
2. The examination of a debtor at a composition meeting must only be such as will properly be in furtherance of the purpose of arriving at a true exhibit of the debtor's affairs.—*Ibid.*

3. If any creditor objects, no vote can be taken on a proposition of compromise, until the examination of the debtor is completed.—*Ibid.*
4. If necessary, the composition meeting may be adjourned to a specified time, while the examination of the debtor is in progress.—*Ibid.*
5. The books of the debtor must be produced on the demand of any inquiring creditor.—*Ibid.*
6. When the books are produced, time may be allowed for experts to examine them.—*Ibid.*
7. The Register has the power to regulate the form and order of proceedings at a composition meeting, and to decide questions that arise, subject to review by the court.—*Ibid.*
8. The Register must decide who are entitled to vote, and in respect to what amount of debts, and pass upon the regularity in form of the proofs and letters of attorney.—*Ibid.*
9. The examination of the debtor ought to be reduced to writing, and sworn to and subscribed by him.—*Ibid.*
10. A creditor who has bought the debt with intent to prevent the adoption of a pending resolution for composition on the debtor's part, may vote upon it, at the meeting for composition, if he had no motive in the purchase which is fraudulent or oppressive, but only a desire to realize as much as possible from the estate.—*Ex parte Morris. In re Morris*, 170.
11. The form of oath prescribed for proving debts in bankruptcy need not be followed in voting upon resolutions for composition.—*Ex parte Morris. In re Morris*, 170.
12. Creditors whose debts do not exceed fifty dollars are to be disregarded in computing the majority who must pass a resolution of composition, as well as in ascertaining the number of those who are required to sign the confirmatory statement.—*In re Wald & Ahle*, 491.
13. The composition is a compromise of a debtor with his creditors, carried on under the regulations of law, and under the supervision of the court. It absolutely discharges the debts of those creditors whose names, addresses, and debts are placed in the statement produced at the meeting of creditors, and no other discharge is needed.—*In re Alphonse Bechet*, 201.
14. Debts of those creditors whose names are not on the statement are not discharged, and the court would not be authorized to grant a discharge as to them.—*In re Alphonse Bechet*, 201.

CONSIGNOR.—See DISCHARGE, 11 ; DISTRIBUTION, 1, 2, 3.

CONTEMPT.—See INJUNCTION, 4.

CORPORATIONS.

1. A by-law of a corporation prohibiting the transfer of stock, by one who is indebted to the corporation, is proper and reasonable.—*In re Bachman*, 223.
2. A debt not due falls within the meaning of the by-law recited in the opinion of the court, the same as one due at the time of the transfer.—*Ibid.*

3. A liability for an unpaid and uncalled-for balance on subscription for stock, is a debt within the meaning of said by-law.—*Ibid.*
4. The officers of the corporation have no power to waive the provisions of such a by-law.—*Ibid.*
5. And any construction given said by-law by the officers or directors of the company, furnishes no rule for a construction by this court.—*Ibid.*
6. The capital stock of a corporation is a trust fund for the benefit of its creditors, and no transfer thereof can be made by which, as to creditors of the company, a stockholder can relieve himself from liability for his subscription for stock, and substitute that of another person.—*Ibid.*
7. A railroad corporation is not liable for an injury caused by the negligence of a special receiver or assignee while operating the road.—*Metz, Administratrix, v. The Buffalo, Corry & Pittsburgh R. R. Co.*, 559.
8. Parties who purchase the property and franchise of a corporation from the assignee, do not thereby become its corporators and acquire the corporate entity.—*Metz, Administratrix, v. The Buffalo, Corry & Pittsburgh R. R. Co.*, 559.

COSTS.

1. The power of the Justices of the Supreme Court to prescribe fees, commissions, charges, and allowances for the officers in bankruptcy is plenary, with the limitation that the fees cannot exceed the rate allowed by law at the time of the enactment of the Revised Statutes, for similar services in other proceedings.—*In re Johnston & Hall*, 345.
2. Rule 30 applies to services rendered before its adoption.—*Ibid.*
3. For the custody of property taken under a provisional warrant, the marshal is entitled to be allowed what is necessary and actually disbursed and paid by him to a keeper, not exceeding two dollars and fifty cents a day.—*Ibid.*
4. The allowance of two dollars and fifty cents can be made for the services of only one keeper.—*Ibid.*
5. The marshal is not entitled to an allowance for the custody of property, by way of commissions on its value.—*Ibid.*
6. If the marshal receives money or property belonging to the estate, he is entitled to a commission of one per centum on the first five hundred dollars, and of one-half of one per centum on the excess over five hundred dollars.—*Ibid.*
7. The marshal is entitled to one dollar per hour for the time of persons whom he employs in taking an inventory.—*Ibid.*
8. The marshal is entitled to the allowance for the time of a party employed in taking an inventory, although that party also acted as keeper and received fees therefor.—*Ibid.*
9. No allowance can be made for the time spent in verifying the inventory with the assignee.—*Ibid.*
10. The allowance for the personal attention of the marshal in taking care of property, can be made only when he himself in person actually and necessarily gives his personal attention, and does not cover personal attention by a deputy.—*Ibid.*

11. The marshal may charge ten cents a folio for a copy of the inventory furnished to the assignee.—*In re Johnston & Hall*, 845.
12. The marshal is entitled to a commission of two per cent. on the disbursements made by him.—*In re Johnston & Hall*, 345.
13. If a trustee, who has been appointed under the 43d Section of the Bankruptcy Act, call a second general meeting of the creditors, the fees of the Register incident to such meeting are not chargeable against the estate.—*Hinsdale & Doughty*, 480.

See DEBTS, 10, 13.

DEBTS.

1. A claim of the United States against bankrupts to recover as a penalty the value of goods imported and entered contrary to law, is a provable debt against the estate of the bankrupts.—*Barnes, Assignee, v. The United States*, 526.
2. The word "debt," as used in the Bankrupt Law, is synonymous with claim.—*Stokes & Leonard v. Mason*, 498.
3. A creditor having demanded payment in full in advance as a condition of consenting to sign a composition agreement of the debtor to pay all his creditors seventy cents on the dollar, was held liable to repay the amount to the assignee in bankruptcy. Subsequently, on paying back the amount to such assignee of the debtor, the creditor sought to prove his *original debt* in bankruptcy, the composition having failed.
Held, under the circumstances, that he was entitled to establish his debt and receive dividends thereon.—*Brookmire & Rankin v. Bean, Assignee*, 217.
4. A mere verdict in an action for a personal tort is not a provable debt.—*Black v. McClelland*, 481.
5. A judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy, upon a verdict rendered before that time, is not a provable debt.—*Black v. McClelland*, 481.
6. Where a note is given for the premium on an insurance policy, containing the provision that if the note is not paid at maturity the policy becomes void while it remains overdue and unpaid, and after the dishonor of the note the vessel insured strands, whereupon the master has the note paid, and afterwards a gale comes up and the vessel is lost, the insurer is not liable.
Though the weather was fair at the time of the stranding, and continued so until after the note was actually paid, yet the proximate cause of the loss was the stranding of the vessel, and under these facts the policy was not revived.—*Cardwell v. Republic Ins. Co.*, 253.
7. A creditor who was induced to release his claim without consideration through the fraudulent representations of another creditor, has a debt that will support a petition in bankruptcy.—*Michaels et al. v. Post, Assignee*, 152.
8. Accrued interest constitutes part of a debt provable against the estate of the bankrupt, and may be used to uphold involuntary proceedings.—*Sloan v. Lewis*, 173.

9. A loss upon a policy issued by a Fire Insurance Company, happening after such company is thrown into bankruptcy, and before the final dividend, is a debt provable against such company.—*In re American Plate Glass and Fire Insurance Company*, 56.
 10. Costs incurred after the bankruptcy are not provable against the estate.—*Sanford v. Sanford*, 565.
 11. Rent and damages for non performance of covenants in lease, accruing after commencement of proceedings in bankruptcy, are not debts provable against the estate.—*In re Peter Hufnagel*, 554.
 12. A party advancing money to a debtor for the purpose of aiding him in committing an act of bankruptcy, will not be permitted to prove a claim for the money so advanced, as a debt against the bankrupt.—*In re Hatje*, 548.
 13. Costs of attachment proceedings pending when petition in bankruptcy is filed, are not to be reckoned among the provable debts of the debtor; nor will such costs be paid from the estate, unless the proceedings are auxiliary to bankruptcy proceedings or otherwise beneficial to the estate.—*In re Hatje*, 548.
 14. B., a member of the firm of E. H. & Co., obtained from S., the bankrupt, two notes, made by S. to the order of E. H. & Co., and for their accommodation, and it was understood that the notes should be paid at maturity by E. H. & Co. The notes were obtained by B. without the knowledge of H., his partner, and were indorsed with the firm name, and discounted at bank, and the proceeds used by B. for his own purposes in fraud of H. H. paid the notes at maturity, and proved them as a claim against the bankrupt estate due to him as an individual.
Held, that H. was bound by the knowledge of his partner that no consideration passed to S. for the notes, and by B.'s agreement that the firm would pay notes at maturity, and that the proof must be expunged.—*George S. Capelle v. Edwin Hall*, 1.
- A debt barred by the statute of limitations of the State in which the proceedings in bankruptcy are pending is not provable against the estate of the bankrupt.—*In re Theodore Noesen*, 422.
15. One member of a copartnership of banking firms, termed a syndicate, having in its possession certain moneys belonging to the syndicate as the result of transactions on its account, became bankrupt.
 Upon a statement of the accounts of the syndicate, it was ascertained, as alleged, that, including the said moneys as portion of the common fund for division among the respective constituents of the syndicate, there was due to the bankrupt firm a certain sum less in amount than the said moneys. Another member of the syndicate, upon behalf of itself and its associates, sought to prove a claim against the bankrupts' estate for the whole of said moneys in the possession of the bankrupt firm, at the time of its failure, claiming dividends, however, on the same only until they should amount to the difference between the said sum and the portion of the profits to which the bankrupt firm appeared to be entitled, upon the statement of the account of all the profits of the syndicate, including the said moneys first mentioned.

Upon objection by the trustee of bankrupts' estate it was *held*, that the proof could not be allowed for more than the difference between the bankrupts' share of the profits, and the amount claimed to be due by them at the time of the failure; and that an absolute allowance of proof for this amount could not be sanctioned independently of any question of equalization or adjustment that might arise upon examining the final account of every one of the several firms of which the so-called syndicate was composed, with such syndicate, and comparing those several accounts with one another, and with the final account of the bankrupts.

Semble, that a partnership cannot prove against the estate of one of its members, except for a debt arising by fraud, as distinguished by contract.—*In re Jay Cooke & Co.*, 30.

DISCHARGE.

1. A retail dealer in groceries, who keeps no invoice-book, but keeps all his invoice-bills carefully together, so that a complete account of all goods received by him can be made out from them (the other customary books being also kept), keeps proper books of account. The question of book-keeping is a question of fact in each case.—*In re J. P. K. Reed*, 890.
2. The *fact* that a merchant or tradesman does not keep proper books of account is made by the Bankrupt Act a cause for refusing to discharge the bankrupt, without any reference to the *intent*, whether fraudulent or otherwise.—*In re Archenbrow*, 17.
3. Specifications were filed in opposition to the bankrupt's discharge, before the passage of the amendments of June 22, 1874. After their passage the bankrupts demurred to the specification charging non-compliance with Section 83 of the Bankrupt Act of 1867, commonly called the "fifty per cent. clause." Also to the one charging that the bankrupts, being insolvent, with the intent to prefer said opposing creditor, made an assignment for his benefit.

Held, That the demurrer was well taken to both these specifications, and that they should be stricken out.—*In re Jones & Hoyt*, 48.

4. Where no assets have come to the hands of the assignee, an application by the bankrupt for his discharge, which is made more than one year after the date of the adjudication in bankruptcy, will be refused, as this condition is not permissive only, but imperative.—*In re Franklin A. Sloan*, 59.

This limitation applies with equal force to all classes of bankrupts, whether to those in which a discharge can be applied for within sixty days, or otherwise.—*Ibid.*

5. In order to obtain a discharge, a voluntary bankrupt is only required to file the consent of the requisite proportion of the creditors to whom he is liable as principal debtor, and who have proved their claims.—*In re James C. Derby*, 241.
6. S. filed a voluntary petition in bankruptcy on the 10th day of November, 1873, and was duly adjudged a bankrupt.

A creditor proved as a debt against the estate a judgment recovered in a

State court March 1, 1873, which was based on a prior judgment, recovered in the same court July 26, 1862. No other debt was proved, and, on the application of the bankrupt for his discharge, the creditor appeared and opposed the granting of the same, on the ground that his consent had not been filed, and that no payment of thirty per cent., or any other sum, had been made to him by the bankrupt.

Held, that the 9th Section of the Bankrupt Act, as amended June 22, 1874, did not apply to the present case, as the petition was filed before the passage of the said act.

That, although the judgment proved as the debt in this case was recovered in 1873, yet the contract on which the judgment of 1862 was based, and which contract was, therefore, the basis of the judgment of 1873, was made prior to the judgment of 1862, and it is not proper to hold that the debt was contracted on the 1st of March, 1873; and, for the reason that the debt was contracted prior to January 1, 1869, no percentage in assets and no assent of creditors are required as a condition for granting the discharge.—*In re George H. Sheldon*, 63.

7. The debt of a creditor is barred by a discharge, although his name was not placed on the schedule, and he received no notice of the proceeding in bankruptcy, or of the petition for a discharge.—*Lamb, Assignee, v. Brown*, 522. *Pattison & Co. v. Wilbur*, 193. *Williams v. Butcher*, 143.
8. The notice that is required in order to give the District Court jurisdiction to grant a discharge is the notice prescribed by the statute on the application for it.—*Pattison & Co. v. Wilbur*, 193.
9. A creditor having a claim arising from fraud may prosecute it in any proper form of suit after the question of discharge has been determined, although he proved it and received a dividend thereon.—*Stokes & Leonard v. Mason*, 498.
10. If the defendant in an action for the unlawful conversion of certain goods pleads a discharge, the plaintiff may reply that the claim was created by the fraud of the defendant.—*Stokes & Leonard v. Mason*, 498.
11. Plaintiff consigned to defendant goods to be sold on commission, with instructions to retain all the proceeds over and above a certain price as his commissions.

The defendant sold the goods but failed to pay the proceeds to the plaintiff, who bring this action to recover the amount. Prior to the commencement of this action the plaintiff filed a petition in bankruptcy against the defendant, who was duly adjudged a bankrupt.

Held, that the debt was one arising out of transactions of a fiduciary character between the plaintiff and defendant, and would not therefore be discharged by the discharge of the bankrupt.—*Treadwell et al. v. Holloway et al.*, 61.

12. If the bankrupt's counsel fails to appear for him in an action, because by mistake he supposed that the counsel for a co-defendant also appeared for the bankrupt, a review of a judgment by default entered against the bankrupt may be granted, so that he may plead a discharge.—*Skurtleff v. Thompson*, 524.
13. O., the administrator of P., brought a suit on three promissory notes

against M. as principal and J. as surety. J. was alone served with process, which was returned not found as to M. An appearance was entered for M. by mistake, and an answer filed, which was withdrawn, the appearance stricken out, and suit continued as to M.

A motion was made for a continuance, which was denied; the affidavit stated that M., the principal, was a material witness, that since the making of the notes he had been adjudged a bankrupt, and that the notes were barred as to him.

The motion was overruled by the court below, because M. was not a competent witness for J., and judgment was given against him.

Held, on appeal, that a discharge in bankruptcy does not *per se* operate as a discharge of all the bankrupt's debts, that the courts do not take judicial notice of discharges in bankruptcy, that, if not pleaded, a judgment may be rendered against an adjudged bankrupt, and M., as a party, was incompetent to testify against an administrator. That if the plaintiff had dismissed as to M., and taken judgment against J., the obligations being joint, the cause of action would have been merged in the judgment, and M. would have ceased to be a party within the meaning of the statute.—*Jenks v. Opp, Administrator*, 19.

See COMPOSITION, 13, 14.

DISTRIBUTION.

1. A consignment of goods under a special contract, in which the consignee gives his acceptances for their value, payable partly at sight and partly at a future day, and agrees to account for the whole price, to guarantee the sales, and to receive a commission of ten per cent., with other stipulations, making him primarily liable for the price of the goods, falls within the principle of *Ex parte White in re Nevill*, Eng. L. R., 6 Ch. Ap., 397, and is a consignment on sale, as distinguished from a consignment on *del credere* guaranty.—*In re Chamberlaines*, 230.
2. Though a consignor may reserve a special property in goods consigned until bills of exchange, drawn for their price, are paid to the bill-holders, yet he cannot, in a consignment on sale to a consignee, in which no such special property is reserved to protect bills drawn upon the consignee for their price, reserve a special property in notes and accounts which the consignee may take for the goods, from persons to whom the consignee may sell them, as against other creditors of the consignee, who goes into bankruptcy.—*Ibid*.
3. A consignor, whose property was sold prior to the bankruptcy, and the proceeds mingled with the general assets, has no lien or specific claim against the estate. He can only share with the other creditors.—*In re Coan & Ten Broeke Carriage Co.*, 203.
4. Attorneys of a voluntary bankrupt are not entitled to payment from the assets as preferred creditors for their services in preparing petition and schedules, but may prove their debt in the usual manner.—*In re Frederick Gies*, 179.
5. If a surplus remains where a bank is in bankruptcy, after the payment of all claims at the amount computed to be due on the date of the adju-

tion, creditors holding its bills may be allowed interest from the date of the adjudication to the time of the payment of dividends.—*In re Bank of North Carolina*, 130.

See PARTNERSHIP, 8, 9, 10, 11, 12, 13, 14, 15.

DISTRICT COURT.—See INJUNCTION, 1, 2, 3, 4; JURISDICTION, 1, 2, 3, 4;
PROVISIONAL WARRANT, 1, 6; SALE, 4.

DOWER.

1. A *feme covert*, by charging her inchoate right of dower for her husband's benefit, does not thereby become a surety for him.—*Hiscock, Assignee, v. Jaycox & Green*, 507.
2. An agreement that a *feme covert* is to be compensated for a release of her contingent right of dower is not to be implied.—*Ibid.*
3. Where real estate is covered by a mortgage, the inchoate dower attaches to the equity of redemption only.—*Ibid.*
4. A *feme covert* is not entitled to dower in real estate which was held as partnership assets.—*Ibid.*

ESTOPPEL.

The fact that a bankrupt is adjudicated upon a petition charging him with making a fraudulent conveyance, does not estop his grantee from claiming that as to him the conveyance is valid.—*In re Charles J. Marter*, 185.

See DISCHARGE, 3.

EVIDENCE.

1. Letters written by the debtor to third parties, admitting the payment of a claim, interposed by attaching creditors in favor of another alleged creditor to defeat adjudication, are admissible in evidence in a contest upon such claim between the attaching and petitioning creditors.—*In re Hatje*, 548.
2. The bankrupt is not a competent witness in a criminal proceeding against him under Section 5132. The Act 22d of June, 1874, Section 8, only applies to civil causes.—*United States v. Black*, 340.
3. If a duly certified copy of the assignment is put in evidence, it is not necessary to prove all the steps in the proceedings.—*Dambman v. White et al.*, 438.
4. The fact that the petitioning creditor and the debtor are brothers, warrants the court in scrutinizing the claim closely, but not in inferring fraud from it alone.—*In re S. Mendelsohn*, 533.
5. The omission to place a claim upon a list of creditors is merely a circumstance of suspicion.—*In re S. Mendelsohn*, 533.

See DISCHARGE, 13.

EXECUTION.—See EXEMPTION, 2.

EXEMPTION.

1. Congress may pass exemption laws, impairing the obligation of contracts.—*In re John Owens*, 518.
2. A bankrupt is entitled to an exemption of household and kitchen furniture,

and other articles and necessities, although the same were taken under an execution levied before the commencement of the proceedings in bankruptcy.—*Ibid.*

3. Under the laws of Indiana, a bankrupt is not entitled to an exemption against a judgment for damages in an action of replevin or for costs.—*Ibid.*
4. Under the Constitution of Florida, the debtor's shop, store, or mill, in which he pursues his usual trade or avocation, as well as the farmer's farm, if connected with and adjacent to his dwelling, is included in his homestead.
5. In Florida a lumberman running a saw-mill cannot claim those portions of the land adjacent to his dwelling which are not auxiliary to his homestead.—*Greely, Assignee, v. Scott and Wife et al.*, 248.
6. Under the Bankrupt Act (Sections 14 and 36) and the Constitution of the State of Arkansas of 1868 (Art. 12, Sec. 1), bankrupts who are co partners are not entitled to separate or individual exemptions out of the partnership effects.—*In re Handlin & Venny*, 49.

FIDUCIARY.—See DISCHARGE, 11.

FRAUD.—See DISCHARGE, 9, 10; EVIDENCE, 4, 5.

FRAUDULENT CONVEYANCE.

A voluntary conveyance by a person not in debt, cannot generally be assailed as fraudulent by subsequent creditors. The omission to record a voluntary conveyance is a badge of fraud.—*Barker v. Smith et al.*, 474.

See ACTS OF BANKRUPTCY, 2; ASSIGNMENT, 8.

INJUNCTION.

1. The District Court, in an involuntary case, may issue an injunction to prevent the disposal of property by a person to whom the debtor has transferred it.—*In re George B. Holland, Jr.*, 408.
2. Creditors of a bankrupt holding an order obtained before bankruptcy, on a general fund, acceptance thereof having been refused, though holding an equitable assignment of the fund *pro tanto*, will be restrained from prosecuting their suit, after bankruptcy, against the managers of the fund, in a State court.—*Walker, Assignee, v. Seigel & Robb et al.*, 304.
3. The United States District Court, as a court of equity, having cognizance of all cases and controversies between a bankrupt and his creditors, has the same power to restrain creditors in judgments at law against a bankrupt that a State court of equity would have over such creditors if the debtor were not a bankrupt.—*Fowler, Assignee, v. Dillon et al.*, 308.
4. Where a general assignee for the benefit of creditors had been enjoined from disposing of the property of *the bankrupt*, and after service of the injunction had made a sale of the assigned property, a motion for an attachment for contempt was denied.

Because, under the case of *Perry v. Langley* (8 Am. Law. Reg., 427), a

general assignment for the benefit of creditors is held, in his circuit, not to be necessarily in fraud of the Bankrupt Act.

Because the District Court had no power to determine the validity of the assignee's title by summary proceedings.—*In re Charles J. Marter*, 185.

5. A State court will not grant an injunction restraining a party from applying for the benefit of the Bankrupt Law.—*Fillington v. Thornton*, 92.

INSOLVENT LAW.—See JURISDICTION, 5, 6, 7.

INSURANCE.—SEE DEBTS, 6, 9.

INTEREST.—See DEBTS, 8 ; DISTRIBUTION, 5 ; JURISDICTION, 2.

INVOLUNTARY BANKRUPTCY.—See PLEADINGS, 1, 2, 3 ; PRACTICE, 2-16.

JUDGMENT.—See DEBTS, 8 ; SALE, 8 ; STAY, 1.

JURISDICTION.

1. The power to reduce the amount of judgments at law rendered on Confederate contracts, to the equivalent in legal money, is an equitable power belonging to State courts of equity, and may be exercised in cases where bankrupts are parties defendant, by the United States District Courts.—*Fowler, Assignee, v. Dillon et al.*, 308.
2. War interest being inequitable under the laws of Virginia, the United States District Court, as a court of equity, may require the judgment-creditors of a bankrupt to abate such interest when embraced in judgments rendered by default before 1873.—*Fowler, Assignee, v. Dillon et al.*, 308.
3. The bankrupt himself, before bankruptcy, or his assignee after bankruptcy, is a necessary party to a suit in equity on such an order, and the Bankruptcy Court has exclusive jurisdiction for the determination of all questions pertaining to the bankrupt's estate.—*Walker, Assignee, v. Seigel & Robb et al.*, 304.
4. If a party who is proceeded against by a summary petition, consents to a reference of the case to a Register to take proof, he thereby gives the District Court jurisdiction over his person, and cannot impeach its decree in a collateral action.—*People ex rel. Jennys v. Brennan*, 567.
5. The adoption of a Bankrupt Law does not divest the State courts of jurisdiction over insolvent proceedings pending at the time of its adoption.—*Lavender v. Gosnell & Tripolett*, 282.
6. When a Bankrupt Law is repealed, the State insolvent laws are again in full force and operation, and need not be re-enacted.—*Ibid.*
7. Where a debtor who has obtained a discharge under a State insolvent law subsequently obtains a discharge under the Bankrupt Law, the discharge in bankruptcy will not affect the right of the insolvent trustee to property acquired by inheritance after the granting thereof.—*Ibid.*
8. A judgment of a State court rendered in an action to which the assignee was a party, directing the payment of a certain sum, out of the assets of the bankrupt, affords no legal ground to authorize the Bankrupt Court to countersign a check, to enable the plaintiff to obtain such sum.—*In re Central Bank of Brooklyn*, 286.

9. Where the assignee in bankruptcy voluntarily submits himself and his rights to the jurisdiction of the State court, he cannot, after judgment, object to the power of the State court to act in the premises and render judgment.—*Scott & Nasse v. Kelly*, 96.
 10. A State court may entertain an action against an assignee for the tortious taking of property not in possession of the bankrupt and belonging to a stranger.—*Leighton v. Harwood*, 360.
 11. A State court may entertain an action by an assignee to recover property disposed of by the bankrupt in fraud of the Bankrupt Law.—*Dambman v. White et al.*, 438; *Kemmerer v. Tool*, 834; *Jordan v. Downey*, 427.
 12. If money is brought into a State court under a *fi. fa.*, the assignee may intervene and claim the fund on the ground that the levy is void under the Bankrupt Law.—*Jordan, Assignee, v. Downey*, 427.
- See APPEAL, 1, 2, 3; INJUNCTION, 5; SALE, 4; PROVISIONAL WARRANT, 1, 6.

LIENS.

1. A partnership is not entitled to retain, towards the payment of its debt, the surplus arising from the securities held by one partner for his debt.—*Sparhawk v. Draxel et al.*, 450.
2. Where a creditor has a general lien, and the debtor, on receiving an advance or other accommodation from such creditor, deposits with him a particular security, specially intended, or appropriated, or even pledged to meet such advance, or to cover such accommodation, the security is subject not only to a particular lien for the advance or liability, but also to the creditor's general lien.—*Ibid.*
3. If two mercantile houses are composed wholly of the same persons, they constitute, notwithstanding the difference in their names of association, one and the same joint party creditor, and if the creditors are entitled to a general lien and there is a deficiency in value of the securities deposited with either house, an ulterior general lien does not attach to any surplus in value of the securities deposited with the other house, except under special circumstances.—*Ibid.*
4. The difference in names implies an intended separation of possession and control, and in order to establish an ulterior general lien in favor of either house, it is only necessary to rebut this implication.—*Ibid.*
5. If the debtor knows that the two houses are composed of the same persons, and the declarations or acts of the parties pending the business, indicate a belief on each side that either house may control the securities deposited with the other house, there is a general ulterior lien, in favor of either, upon any surplus in the hands of the other.—*Ibid.*
6. A lien authorized by a statute, on compliance with certain provisions concerning record and notice, is not completed until the statutory requisites are complied with; and if these are postponed until after the filing of a petition in bankruptcy, on which an adjudication follows, no lien will exist.—*In re Philo R. Sabin*, 142.

LIMITATIONS.

1. The clause limiting the commencement of actions by and against the as-

- signee to two years after the right of action accrues, applies to all judicial contests between the assignee and any person whose interest is adverse to his.—*Bailey, Assignee, v. Weir et al.*, 24.
2. Though this clause in terms includes all suits at law or in equity, the general principle applies here, that where the action is intended to obtain redress against a fraud concealed by the party, or which from its nature remains secret, the bar does not commence to run until the fraud is discovered.—*Ibid.*
 3. And this doctrine is equally applicable on principle and authority to suits at law as well as in equity.—*Ibid.*
 4. The statute of limitations ceases to run against the creditor of a bankrupt at the commencement of the proceedings in bankruptcy, and, if not barred at that time his claim may be proved afterwards, though at the time of proof it would be otherwise barred.—*In re M. Eldridge & Co.*, 540.
 5. The effect in bankruptcy of the petition, the adjudication, and the assignment is to vest the assets in the assignee as a trust, against which the statute of limitations ceases to run.—*Ibid.*
 6. The filing of the petition by a bankrupt and his including the claim of a creditor in the schedule of debts, is equivalent to a new promise, so as to prevent the claim, if not already barred, from being defeated by the statute of limitations.—*Ibid.*
 7. A court of bankruptcy, like a court of equity, will respect State statutes of limitation, and apply them in cases in which they are properly applicable.—*Ibid.*
 8. The proof of claim in bankruptcy is not a *suit*, the commencing of which is *per se* necessary to suspend the running of the statute of limitations.—*Ibid.*

MARSHAL.—See Costs.

MORTGAGE.

If the holder of a note the indorser of which is secured by a mortgage, proves the note as unsecured, this does not extinguish the mortgage, for the assignee is thereupon subrogated to the rights of the holder.—*Hiscock, Assignee, v. Jaycox & Green*, 507.

See DOWER, 8 ; RENT, 9, 10, 11 ; SALE, 5 ; STAY, 2.

PARTNERSHIP.

1. The intent to consider real estate partnership assets may be implied from the fact that the losses in the transaction are to be sustained by the assets of the firm, and the profits which may accrue are to augment the capital of the firm.—*Hiscock, Assignee, v. Jaycox & Green*, 507.
2. When real estate is impressed with the character of personalty, the onus is on the party who alleges that it has lost that character, to show, not only that the partnership creditors have been paid, but that, as between themselves, the accounts of the partners have been settled.—*Ibid.*
3. A partner is bound by the act of his copartner within the scope of the

business of the firm, even if that act be fraudulent as between the partners.—*George S. Capelle v. Edwin Hall*, 1.

4. Where there have been distinct firms of A & B and A & C, the three persons cannot be joined in one proceeding in bankruptcy, though the latter firm may have undertaken to pay the debts of the former.—*In re Wallace & Newton*, 191.
5. Where B. petitioned for an adjudication in bankruptcy against himself and his late copartner A., and it appeared that upon the recent dissolution of the firm B. had agreed to pay the joint debts and had given bond to A., with a solvent surety to secure him against his liability for those debts; *held*, the petition should be dismissed as against A.
Upon such a petition it is not enough to prove that the joint assets are insufficient to pay the joint liabilities; the firm and its members must be shown to be insolvent.—*In re Bennett et al.*, 181.
6. Whether the court has any discretion to refuse an adjudication of bankruptcy because the petition has been concerted or brought for collateral purposes, *quære?*—*Ibid.*
7. But where a former partner and his surety for joint debts concerted the petition against the retiring partner, the court held them bound to make out a clear case.—*Ibid.*
8. When all the assets of a bankrupt firm are expended in the payment of costs and there is no fund to be divided among the firm creditors, the firm and individual creditors must be paid *pari passu* out of the separate estate of each partner.—*In re McEwen & Sons*, 11.
9. If a creditor having a firm note indorsed by one partner and holding property of the partner as security, obtains payment by a sale of the security after the commencement of the proceedings in bankruptcy, the separate creditors are entitled to receive from the joint fund a sum equal to the dividend on the note —*In re Norman B. Foot et al.*, 337.
10. If a bankrupt partner was a member of two firms, the assets of the bankrupt firm should be applied to pay the firm debts, and any surplus that may remain after paying the individual debts in full, should be distributed *pro rata*, among the creditors of both firms.—*In re Robert K. Dunkerson & Co.*, 391.
11. In the absence of fraud joint debts may be converted into individual debts by one partner's undertaking for a good consideration to pay them.—*In re Collier, Taylor & Co.*, 266.
12. If the partners, more than four months before the commencement of the proceedings in bankruptcy, transferred all their property, both separate and joint, to one partner, who undertook to pay the firm debts, all the assets will be treated as the separate assets of that partner.—*Ibid.*
13. A promise by one partner to pay all the firm debts may be enforced by the firm creditors, although they were not cognizant of the promise when made, and although the consideration did not move from them.—*Ibid.*
14. If there is no joint estate, the firm creditors may share *pari passu* in the separate estate.—*Ibid.*
15. When a debt from one partner to a bankrupt firm was incurred by the

consent or privity of the other partners, proof of the joint creditors against the separate estate will not be admitted in a Court of Bankruptcy.—*In re McEwen & Sons*, 11.

See DEBTS, 14, 15; DOWER, 4; LIENS, 1, 2, 3, 4, 5.

PLEADING.

1. Where a fraudulent stoppage of payment of commercial paper is alleged, the pleader may aver a general stoppage of payment without describing any paper, or he may aver the non-payment of a particular piece of paper, describing it, and rely upon it as *prima facie* evidence of a general stoppage.—*In re Joseph E. Hadley*, 366.
2. Where a preference is alleged it is not necessary to state that such preference was in fraud of the Bankrupt Act, but the name of the person preferred should be set forth.—*Ibid.*
3. The nature of petitioner's debts should be so far stated in the petition that the court may see they are provable against the estate.—*Ibid.*
4. A statement in a complaint that the plaintiff is assignee in bankruptcy, may be treated as surplusage, or at most as *descriptio personæ*.—*Dambman v. White et al.*, 438.
5. Under a general averment that the plaintiff was possessed as of his own property, proof may be given that he acquired the title by means of proceedings in bankruptcy.—*Ibid.*
6. A complaint need not state how the plaintiff acquired title to the property in controversy.—*Ibid.*
7. In suits by an assignee, his representative character need not be averred in the pleadings.—*Ibid.*
8. A record cannot be impeached without previous notice by proper form of pleading.—*Michaels et al. v. Post*, 152; *Sloan v. Lewis*, 178.

PRACTICE.

1. A proceeding in bankruptcy from the time of its commencement until the final settlement of the estate, is but one suit.—*Sandusky v. First National Bank*, 176.
2. The allegations in the deposition in proof of the act of bankruptcy should be made upon the personal knowledge of the deponent and should make out a *prima facie* case. Such allegations should be made by separate deposition and not in the petition itself.—*In re Joseph E. Hadley*, 366.
3. The depositions in proof of debt are intended to support the allegations of the petition, not to supply defects in them.—*Ibid.*
4. The forms prescribed by the Supreme Court should be followed as closely as the circumstances will permit.—*Ibid.*
5. Where a petition is verified by an attorney, the non-residence of his principal should be alleged directly and not by way of recital.—*Ibid.*
6. Affidavits taken before notaries public cannot be read in matters pending before this court.—*In re James A. McKibben*, 97.

7. Where the commissioner who took the deposition in proof of debts failed to sign the jurat to the deposition, the omission may be supplied if the commissioner distinctly recollects the fact of the creditor signing and verifying it in his presence, and, if not, the party may be sworn and the deposition filed *nunc pro tunc*.—*In re James A. McKibben*, 97.
8. In computing the *number* of creditors who must join in a petition for adjudication, creditors whose respective debts do not exceed two hundred and fifty dollars, are not to be reckoned; but in computing the *amount or value* of creditors, all should be included. The aggregate of petitioners' debts must be equal to one-third of all the debts, irrespective of amount, provable against the estate.—*In re Joseph E. Hadley*, 366.
9. Though the aggregate of the debts of the petitioners whose debts exceed two hundred and fifty dollars in amount, does not equal one-third of the aggregate of all debts exceeding two hundred and fifty dollars, still the petition should be sustained if the aggregate of all the petitioners' debts equal one-third of the aggregate of all the debts provable against the estate.—*In re John B. Bergeron*, 385.
10. A petition was filed against M. by seven of his creditors. On the hearing of the order to show cause, it appeared that two of the creditors' claims were for amounts less than two hundred and fifty dollars each, but that the five remaining did in fact constitute the requisite number in value and amount.
Held, that the petition was defective in its allegations, and did not make out a case for an adjudication, but that it might be amended so as to conform to the facts.—*In re James A. McKibben*, 97.
11. In estimating the number and value of creditors who must join in the petition in involuntary bankruptcy, creditors who have been fraudulently preferred by the debtor are not to be counted.—*Clinton v. Mayo*, 39; *In re M. C. Israel*, 204.
12. The attaching creditor, though not a party to bankruptcy proceedings, may contest adjudication, on the ground that the requisite number and amount of creditors have not joined in the petition.—*In re S. Mendelsohn*, 533; *In re Hatje*, 548.
13. An attaching creditor may move to set aside an adjudication of bankruptcy, though no party to the bankruptcy proceedings.—*In re John B. Bergeron*, 385.
14. On the hearing of a petition in compulsory bankruptcy, when the debtor defendant declines to appear and defend in form, but is personally present, the court will hear a suggestion from any creditor, though it is a creditor who is charged with having received a fraudulent preference, that an insufficient number of creditors have joined in the petition.—*Clinton v. Mayo*, 39.
15. When such a suggestion has been made, the court, if the bankrupt is relied upon to prove the insufficiency of the number of petitioning creditors, will require him to make his statement in writing under oath, and accompany it with a list of all his creditors, and the amounts due them.—*Ibid.*

16. If the examination into the question, whether a sufficient number of creditors have joined in the petition, has not been completed at the hearing on the day to which the order on the debtor defendant to show cause has been made returnable, and is continued until the next day, the defendant having been previously served personally with the order, and being personally present on the return day, and having failed on that day to demand a jury for the trial of the charges of acts of bankruptcy ; in such a case, the defendant will not be allowed a jury if he demand one on the second day ; that not being an " adjourned day " within the meaning of Section 41 of the Bankrupt Law (Section 5026 of the Revised Statutes at Large).—*Clinton et al. v. Mayo*, 39.
17. If a demurrer to an intervening petition is overruled, the demurrant is entitled to answer and be heard on the merits.—*Jordan, Assignee, v. Downey*, 427.
18. If a cause is heard on petition and answer, the statements in the answer will be deemed to be true.—*Ibid.*
19. Where a decree is sought to be reversed for defects in an adjudication, they should be specifically pointed out, and if they consist of matters of fact, the evidence should be the subject of distinct reference.—*Michaels et al. v. Post, Assignee*, 152.

See PROVISIONAL WARRANT.

PREFERENCE.

1. Section 11 of the amendatory Bankrupt Act of June 22, 1874, amending Section 35 of the original act by inserting " knowing," applies to cases brought after the time when the amendatory act took effect, although the instrument creating the alleged illegal preference was executed before June 22, 1874.—*Singer v. Sloan*, 208 ; *Boothe, Assignee, v. Neely & Co.*, 398 ; *contra, Bradbury, Assignee, v. Galloway*, 299 ; *In re Milton Montgomery*, 321.
2. The amendment above referred to, made by Section 11 of the amendatory act, works a substantial change in Section 35, and within the meaning of Section 11 of the amendatory act, " knowing " and " having reasonable cause to believe " that a fraud on the act was intended, are not legal equivalents.—*Singer, Assignee, v. Sloan et al.*, 208.
3. The provision in Section 11 of the amendment of June 22d, 1874, which enacts that nothing contained in Section 35 of the original act shall be construed to invalidate any security taken in good faith at the time of making a loan, is only declaratory of what the law was before the passage of the amendment. Before the original act was amended, a mortgage given to secure a loan made at the time, in good faith, was valid, even though the mortgagor was insolvent at the time of executing the same, and the party making the loan had knowledge of the fact.—*In re Milton Montgomery*, 321.
4. Section 10 of the Act of June, 1874, changing the period of four to two months, is not retrospective in its operation, and does not affect transactions happening before the time fixed for it to take effect.—*Bradbury, Assignee, v. Galloway*, 299.

5. The defendants, brokers, purchased from another broker certain shares of stock, the transfer and payment to be made on the next day.

On the next day the vendor sent to the vendees a bill of sale of the stock, and notified them thereby that the stock had been or was about to be transferred. Payment was thereupon made by the vendees.

The vendor failed later in the day, without having made the transfer, but within a few hours after his failure, upon importunity of the vendees, who had knowledge of his insolvency, he gave to them a certificate of a certain number of the shares agreed to be sold, with power of attorney to make the transfer, and procured a debtor of his to make the transfer of the remainder, which was done within a few days subsequently.

The assignees in bankruptcy of the vendor, by a bill in equity, sought to restrain the vendees from transferring or selling the said shares of stock, and to enforce a delivery thereof to the assignees, alleging that the receipt thereof was a preference, and in violation and fraud of the Bankrupt Act. The court dismissed the bill.—*Sparhawk et al., Assignees, v. Richards & Thompson*, 74. ✓

6. A mere accounting or settlement between an insolvent debtor and creditor, not followed by any actual change or transfer of property, rights, or credits, to the prejudice of other creditors, is not contrary to the Bankrupt Act, but the assignee of such debtor is not bound by such settlement, but may show that it is erroneous, or fraudulent.—*In re Comstock & Co.*, 110.

7. When an advance is made upon an agreement that certain and specific property shall be conveyed, and the conveyance is made within a reasonable time thereafter, the advance will be considered as a present consideration for the conveyance.—*Gattman & Co. v. Honea, Assignee*, 492.

8. If a mortgagor conveys in fraud of the Bankrupt Law, actual notice must be brought home to the mortgagee who has taken conveyance under circumstances promising material relief and assistance to the debtor, and apparently for that purpose.—*Boothe, Assignee, v. Brooks, Neely & Co.*, 398. ✓

9. A debtor who pays the money under an order of his creditor to a third party, with the intent thereby to enable his creditor to give a preference to such third party, will be deemed to still hold it, and the assignee may sue him for its recovery.—*Fox et al. v. Gardner*, 137.

10. A party who has accepted a draft with intent to enable the drawer to prefer the payee is not liable thereon.—*Ibid.*

11. A creditor who obtains payment of his debt under a judgment, through the passive non-resistance of the debtor, is not liable to repay the money to the assignee.—*Henkelman, Jackson & Phelps v. Smith, Assignee*, 121. ✓

12. When the issue to be decided is whether a judgment against an insolvent was obtained with a view to give a preference, the *intention* of the bankrupt is the turning-point of the case, and all the circumstances which go to show such intent should be considered. ✓

Hence, when an ordinance of a State gave a preference as to time of trial in

the courts, in suits on debts contracted after a certain date, and the insolvent debtor gave his son and niece new notes for an old debt, so as to enable them to procure judgments before his other creditors, the fact that the ordinance was void does not repel the inference of intent to give and obtain a preference; and when a judgment was so obtained, which gave priority of lien, it will to that extent be null and void.—*Little, Assignee, v. Alexander*, 134.

- ✓ 13. The consent of the debtor to revive a judgment so as to continue the lien thereof does not affect the creditor with knowledge of insolvency which he had no reasonable cause to believe from any other facts.—*Kemmerer v. Tool*, 334.

See PROOF OF DEBT, 4, 5, 6.

PROOF OF DEBT.

1. The security that must be liquidated before the creditor can prove his debt, must be upon property, real or personal, of the bankrupt, that may be surrendered or conveyed to the assignee.—*In re Anderson*, 502.
2. A claim which is secured by the indorsement, guaranty, or collateral liability of a third person may be proved as unsecured.—*Ibid*.
3. A creditor who holds a debt against a bankrupt, whose liability arises by his accommodation indorsement of bills of exchange, to secure the payment of which the drawers and acceptors have given certain collateral security, may prove his debt as unsecured.—*In re Dunkerson & Co.*, 413.
4. If the preferred creditor surrenders his preference before the entry of the judgment, but after the opinion is given, where the case is tried before the court, he may prove his debt where there is only constructive fraud.—*Burr v. Hopkins, Assignee*, 211.
5. If the preferred creditor waits until suit is instituted, he may be required to pay the expenses of the assignee before he is allowed to prove his debt.—*Ibid*.
6. In respect to the right to prove it makes no difference whether the transfer is constructively fraudulent under the Bankrupt Law, or under the statute of Elizabeth.—*Ibid*.
7. A preference will not bar the proof of a debt, unless it was given and received by the parties to such debt; and therefore, where a creditor received a preference from the firm of A, B, & C, he is not barred from proving another debt against the firm of B & C.—*In re Comstock & Co.*, 110.
8. A certificate of deposit proved as a claim in bankruptcy is dishonored paper, and no longer has the qualities of a negotiable instrument.—*In re Sime & Co.*, 315.
9. One who takes an assignment of such a claim, from the apparent owner, as security for an antecedent debt merely, parting with nothing, and incurring no responsibility on the faith of the assignment, is not a *purchaser for value*, and has no equity superior or equal to that of the real owner of the claim.—*Ibid*.
10. At the first meeting of creditors in the case of a voluntary bankrupt,

proofs of certain claims against the estate were presented, but the names of the alleged creditors did not appear on the bankrupt's schedule. *Held*, that the circumstance was sufficient to raise a doubt as to the validity of such claims within the meaning of Section 5083 of the R. S., and ordered that the proofs be postponed until after the election of an assignee.—*In re Elijah Milwain*, 358.

11. In a proof of debt, the creditor should set forth at least one full Christian name of the affiant and of the bankrupt, as well as the surname.—*In re Wm. H. Valentine*, 389.

See COMPOSITION, 11.

PROVISIONAL WARRANT.

1. The Bankrupt Law only authorizes the arrest of the debtor under a provisional warrant to secure his attendance at the hearing and adjudication, and no arrest can be made under the warrant after an adjudication.—*Usher v. Pease*, 305.
2. A bond given by the debtor to secure his release from an arrest made under a provisional warrant after an adjudication, is void.—*Ibid*.
3. In an application for a provisional warrant and order of arrest of the debtor, under Section 40 of the Bankrupt Act of 1867, the better practice is to file a separate petition, supported by affidavits of persons having knowledge of the facts, when the same are not stated in the petition of the petitioner's own knowledge.—*In re James A. McKibben*, 97.
4. In the present case, as the main facts are upon information and belief, a provisional warrant and order of arrest will not be granted; but, as sufficient cause does in fact exist for the issuing of a provisional warrant, leave will be given to make another application.—*Ibid*.
5. Facts relied upon to justify a warrant of arrest and seizure should not be set forth in the creditor's petition.—*In re Joseph E. Hadley*, 366.
6. The District Court, in an involuntary case, has no authority under a provisional warrant to order the seizure of property from the possession of a person to whom the debtor transferred it before the filing of the petition.—*In re George B. Holland, Jr.*, 403.

PURCHASER.—See SALE, 7, 8.

REGISTRATION.—See ASSIGNEE, 1.

RENT.

1. If a note taken for rent is not paid at maturity the landlord is entitled to all his remedies for the security or collection of his claim, in the same manner as if the note had never been given.—*In re Bowne & Ten Eyck*, 529.
2. If a tenant makes an assignment for the benefit of creditors to a trustee who sells the goods on the premises after the commencement of the proceedings in bankruptcy, and turns the proceeds over to the assignee, the landlord is entitled to payment of the rent out of the proceeds.—*Ibid*.

3. Although the claim of a landlord is not strictly a lien, yet under the laws of Mississippi it is entitled to priority of payment out of the estate.—*Austin v. O'Reilly, Assignee*, 829.
4. The assignee acquired his title to movable property found upon the premises, subject to the rights of all other persons, and where rent is a lien upon the personal property of the bankrupt, it must be paid first out of the proceeds of the sale.—*Longstreth v. Pennock et al.*, 95.
5. The prevention of injury to the premises by not removing machinery is not a circumstance to be considered in determining the compensation to the landlord for the use of premises by the assignee.—*In re Breck & Schermerhorn*, 215.
6. A lease which cannot be assigned without the consent of the landlord is canceled by the bankruptcy of the tenant.—*In re Breck & Schermerhorn*, 215.
7. The landlord is entitled to a reasonable compensation for the use of the premises from the commencement of the proceedings in bankruptcy until the surrender by the assignee, if the estate is benefited to that amount.—*In re Hamburger & Frankel*, 277; *In re Breck & Schermerhorn*, 215.
8. The assignee should pay from the assets the rent of a store occupied by him, from the filing of the petition to the date of surrendering possession.—*In re Peter Hufnagel*, 554.
9. The filing of a bill for the sale of the property free from incumbrances does not have the effect to give the mortgagee a right to the rents thereafter collected.—*In re J. S. K. Bennett*, 257.
10. The assignee is entitled to the rents of mortgaged property until the mortgagee claims them.—*In re J. S. K. Bennett*, 257.
11. The filing of a petition in court and notice thereof to the assignee is sufficient to entitle the mortgagee to rents thereafter accruing.—*In re J. S. K. Bennett*, 257.

See DEBTS, 11.

REPLICATION.—See DISCHARGE, 10.

SALE.

1. A creditor who is vested with authority to sell securities deposited with him, cannot exercise it otherwise than under a trust for the debtor's benefit.—*Sparhawk et al. v. Drexel et al.*, 450.
2. A creditor who holds stocks as collaterals, need not sell them by auction, but may sell them at the stock exchange or brokers' board.—*Ibid.*
3. Where a judgment creditor has made a levy upon the property of the bankrupt before petition filed, and after commencement of proceedings in bankruptcy procures the sheriff to sell the property upon his execution, the court may set aside the sale, or may confirm it and permit the creditor to retain the proceeds. The latter course is proper where the creditor acted under a misapprehension of his duty, and the property brought its full value.—*In re Peter Hufnagel*, 554.

4. The District Court may direct the sale of property free from all incumbrances.—*Ray v. Brigham et al.*, 145.
5. The rights of a mortgagee, who was not made a party to proceedings in the District Court, to sell the property, are not affected by the proceedings.—*Ibid.*
6. When the assignee sells incumbered property without any special order of the court, he sells it subject to all lawful incumbrances, and can convey no better or higher interest than the bankrupt could have done.—*Ibid.*
7. A sale of land free from incumbrances, does not pass to the purchaser the bankrupt's right to any portion of the growing crops thereon, stipulated to be paid him by way of rent.—*In re Bledsoe*, 402.
8. A purchaser is not liable for an injury caused by the negligence of the assignee after the sale and before the confirmation thereof.—*Metz, Administratrix, v. The Buffalo, Corry & Pittsburgh R. R. Co.*, 559.

See ASSIGNEE, 2, 3 ; CORPORATION, 8.

SECURITIES.—See LIENS, 1, 2, 3, 4 ; SALE, 1, 2.

STAY.

1. A party who holds a judgment entered in an action for a personal tort after the commencement of the proceedings in bankruptcy, need not apply to the District Court for leave to issue an execution.—*Black v. McClelland*, 481.
2. If a mortgagee institutes proceedings to foreclose a mortgage after the commencement of the proceedings in bankruptcy, such proceedings may, on the application of the assignee, be stayed until the bankruptcy proceedings are closed.—*Markson et al. v. Haney*, 484.

SUBPOENA.

A subpoena for a witness may be served in another district, if he does not live more than one hundred miles from the place where the Register who issues the subpoena requires the witness to attend.—*In re William S. Woodward*, 297.

SUPERVISORY JURISDICTION.—See APPEAL, 2.

SUSPENSION OF PAYMENT.—See ACTS OF BANKRUPTCY, 8.

TRADER.—See DISCHARGE, 1, 2.

TRANSFERS TO DEFEAT ACT.

1. An insolvent debtor may, for a present and sufficient consideration, sell or encumber his estate, provided the transaction is *bona fide*, and free from fraud, or an intention to defeat the operation of the Bankrupt Law.—*Gattman & Co. v. Honea, Assignee*, 492.
2. To defeat a conveyance for a present consideration, the proof must show that the party to whom or for whose benefit it was made knew or had

reasonable cause to believe the grantor insolvent, and knew that a fraud upon the law was intended.

8. The knowledge that a fraud was intended may be established by circumstantial evidence.—*Gattman & Co. v. Honea, Assignee*, 492.

THIRTY PER CENT.—See DISCHARGE, 3, 5, 6.

VOTE.—See COMPOSITION, 10.

WARRANT.—See PROVISIONAL WARRANT.

WITNESS.—See DISCHARGE, 18 ; EVIDENCE, 2.



